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Developments in the State Regulation of Major and Minor Political Parties

Benjamin D. Black

DEVELOPMENTS IN THE STATE REGULATION OF MAJOR AND MINOR POLITICAL PARTIES

INTRODUCTION

America's courts recognized early the conflict of interest inherent in providing politicians the power to create the electoral laws by which they are elected. As Judge George W. McCrary, a legal scholar, Eighth Circuit Judge, and member of the House of Representatives noted in 1897:

> It is within the province of the Legislature to prescribe reasonable rules and regulations for the conduct of elections . . . . But it is manifest that under color of regulating the mode of exercising the elective franchise, it is quite possible to subvert or injuriously restrain the right itself; and a statute that clearly does either of these things must, of course, be held invalid . . . .[1]

The temptation to use electoral regulations as political weaponry is understandable; politicians can lose power through the conduct of elections. It is therefore not surprising that political scientists have found that the Democrats and Republicans "have built themselves virtually impenetrable barriers against challenge by new parties."[2]

Many states have created a framework of laws that control the activities of political parties.[3] There are two paths to elected political participation in American government on a mass scale:[4] (1) participation in the major parties,[5] or (2) the creation of new political parties.

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1 GEORGE W. MCCRARY, AMERICAN LAW OF ELECTIONS § 126 (Henry L. McCune ed., Chicago, Callaghan & Co. 4th ed. 1897). Some modern courts explicitly recognize this problem as well. *See* Patriot Party v. Mitchell, 826 F. Supp. 926, 928 (E.D. Pa. 1993) ("The state legislature, which enacts the ballot access laws, is comprised primarily of major party politicians. The tension exists because these laws may become so restrictive and burdensome that they impinge upon a minor party's . . . rights . . . ."), *aff'd*, 9 F.3d 1540 (3d Cir. 1993).

2 Richard S. Katz & Robin Kolodny, *Party Organization as an Empty Vessel: Parties in American Polities, in* HOW PARTIES ORGANIZE 23, 47 (Richard S. Katz & Peter Mair eds., 1994).

3 *See, e.g.*, N.Y. Elec. Law §§ 2-100 *et seq.* (McKinney 1978 & Supp. 1997).

4 The election of independent candidates presents many of the same concerns as minor-party candidacies. Although these concerns are certainly relevant to many of the issues raised in this Note, an in-depth analysis of them is beyond the Note's scope. For an analysis of independent candidates in Supreme Court jurisprudence see Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 B.Y.U. J. PUB. L. 281, 288-306 (1993).

5 As Political Scientist James W. Ceaser explains:

> The party system . . . affects political activity in several key areas. It has a major impact on which political forces are given expression and which, . . . are held back; on how majorities are put together; on how governing takes

In a democracy, political parties are political actors of vital importance: they provide the means through which ordinary citizens can control their own governance.[6] Despite the vaunted position of political parties in political theory, politicians in state legislatures often interfere in the parties' operation and constrain their political activities. Political scientist Kay Lawson has noted:

> State laws undermine political parties in almost every way imaginable. They make it difficult and sometimes impossible for parties to form and to get on the ballot, to control their own nomination processes, to define issues effectively, and to hold their elected representatives accountable. . . . One cannot speak of party renewal . . . without considering the need for reform of the election laws at the state level.[7]

For example, the Florida legislature requires that the state parties' executive committees include all congressmen, allows elected officials to appoint the members of the executive committee, and creates a system of weighted voting by elected officeholders in internal party elections.[8] New York state law controls the composition of county committees,[9] party quorum requirements,[10] and the terms party members may serve.[11]

This Note surveys the recent developments in constitutional law that limit a state's ability to control political parties. The Supreme Court has long recognized that political organizations have a First Amendment right, the freedom of association, to work collectively with others in pursuit of political goals.[12] In addition, courts have relied on a number of constitutional doctrines to recognize a "right to vote" that protects voters' ability to participate effectively in the political process.[13] These doctrines restrict the states' power to control political parties' internal political affairs and access to the states' political machinery.

Commentators consistently criticize the Supreme Court's jurisprudence on the state regulation of political parties as muddled and

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> place; and on how people are contacted and mobilized to participate in politics.

James W. Ceaser, *Political Parties-Declining, Stabilizing or Resurging?*, *in* THE NEW AMERICAN POLITICAL SYSTEM 87, 102 (Anthony King ed., 1990).

6 *See* A. JAMES REICHLEY, THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES 414-15 (1992) (listing the beneficial functions parties serve in a democracy).

7 Kay Lawson, *How State Laws Undermine Parties*, *in* ELECTIONS AMERICAN STYLE 240 (A. James Reichley ed., 1987).

8 FLA. STAT. ANN. § 103.091 *et seq.* (West Supp. 1996).

9 N.Y. ELEC. LAW §§ 2-104, 2-110 (McKinney 1978).

10 N.Y. ELEC. LAW § 2-104(3) (McKinney 1978).

11 N.Y. ELEC. LAW § 2-106 (McKinney Supp. 1996).

12 *See infra* Part I.B.1.

13 *See infra* Part I.B.2.

confusing.[14] This Note discusses two emerging trends in electoral law jurisprudence. First, over the past decade, the Supreme Court and lower courts have decided a series of cases that have strengthened the major political parties' associational rights,[15] but have slightly weakened protection for a voter's right to a "meaningful" or effective vote.[16] As a result of these decisions, the major parties have gained significant legal power to define and control the interual party processes without state interference.[17] With this increase in "party autonomy," the courts have strengthened the power of state party organizations to control the content of the party's ideological message,[18] and increased their ability to influence the nomination of candidates.[19] These developments have the potential to increase the major parties' effectiveness as political actors. Second, in contrast to their treatment of major parties, the courts have not improved the ability of minor parties to compete in the political marketplace, but instead have provided states greater leeway to obstruct their development. Courts have generally upheld state intrusions into minor parties' internal affairs[20] and are very unlikely to invalidate state ballot-access laws that burden minor party activities.[21] Taken together, these two trends produce a legal framework that actively discourages the formation of new minor parties and decreases the effectiveness of those that exist, while simultaneously strengthening the political effectiveness of

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14 *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-20, at 1102 (2d ed. 1988) (discussing "the doctrinal enigmas that bedevil the law of ballot access"); Todd J. Zywicki, *Federal Judicial Review of State Ballot Access Regulations: Escape from the Political Thicket*, 20 T. MARSHALL L. REV. 87, 88-89 (1994) ("Where the Supreme Court has intervened [in electoral law challenges], its decisions have been essentially random, both with regards to the level of review to be applied, and with regard to how the various fact patterns have been related."); Bennett J. Matelson, Note, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238, 1245-46 (1994) ("The Court's ballot access cases have yielded few unsbifting rules [because of] the Supreme Court's failure to establish clearly the level of scrutiny to apply to the challenged state action.").

15 *See infra* Part I.D.

16 *See infra* Part I.E.1.

17 *See, e.g.*, Brian L. Porto, *The Constitution and Political Parties: Supreme Court Jurisprudence and its Implications for Partybuilding*, 8 CONST. COMMENTARY 433 (1991) (documenting the increased legal capacity of the parties to govern themselves free from state interference); William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 691 (1995) ("While the Supreme Court has afforded the states considerable latitude to promote orderly elections, it has concurrently strengthened the rights of political parties as core First Amendment actors."). *But see* Mark E. Rush, *Voters' Rights and the Legal Status of American Political Parties*, 9 J.L. & POL. 487 (1993) (challenging the commentaries that suggest that the Court has deliberately expanded the associational rights of political parties).

18 *See infra* Part I.D.1.

19 *See infra* Part I.D.2.

20 *See infra* Part I.E.

21 *See* discussion Part III. Ballot access laws are the formal requirements a party or candidate must satisfy before a state will print a candidate's name on a ballot.

the major parties.[22] Minor parties, who represent views that conflict with established party dogma, are left unprotected in constitutional jurisprudence and their message is filtered out and lost. As a result, the gap in the legal status of minor and major parties—a bias that has favored the major parties for the majority of the century—has grown.

Part I of the Note provides an overview of the jurisprudence defining the constitutional limitations on states' power to regulate political parties and reviews recent courts of appeals decisions that demonstrate the application of the Supreme Court's associational rights and "right to vote" jurisprudence. Part II provides a short survey of ballot access litigation, a special class of cases implicating both minor-party associational rights and voters' "fundamental" right to vote. This Part asserts that minor parties will not succeed in reducing state barriers to political participation through future court challenges.

Finally, Part III discusses the political and doctrinal consequences of these legal developments. This Part argues that the expansion of major-party associational rights reinforces the disparity between the legal status of major and minor parties and undermines the Supreme Court's ballot-access doctrine. Finally, this Part discusses the political implications of these legal developments in light of current trends in electoral and party politics. The Note concludes that the current legal doctrine that defines the permissible state regulation of minor parties should be reassessed.

I
STATES' POWER TO REGULATE THE "TIMES, PLACES AND MANNER" OF ELECTIONS

A. The Elections Clause: A Historical Perspective

The Elections Clause of the Constitution provides that states may regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives . . . but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[23] The clause represents a carefully drawn compromise. The states retained the discretion to promulgate regulations, but the federal government reserved the power to supersede state laws in or-

22 *See, e.g.*, Lawson, *supra* note 7, at 243-47.

23 U.S. CONST. art. I, § 4. The Constitution includes other clauses that define the limits of states' power to regulate elections. U.S. CONST. art. I, § 2, cl. 1 provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST. amend. XVII provides, "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures."

der to protect its own existence from state interference.[24] Otherwise, as Justice Story noted, "an exclusive power in the state legislatures to regulate elections for the national government would leave the existence of the union entirely at their mercy."[25] Although the Founders invested considerable discretion in the states, they did so mindful of the potential for the states to use that power to subvert the national interest. Therefore, a state's power to regulate elections is clearly limited. Specifically, a state's broad power to prescribe the time, place, and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens."[26]

Any interpretation of the Elections Clause should also recognize a simple historical fact: when this provision was drafted, political parties were generally unknown and positively feared.[27] To the Founders, the entire structure of our government—the separation of powers—was predicated on a fear that factions, operating through parties, would impose their will on the country.[28] John Taylor, a Founding Father and libertarian from Virginia, lamented: "The situation of the public good, in the hands of the two parties nearly poised as to numbers, must be extremely perilous."[29] John Adams feared the specter of the "division of the republic into two great parties, each arranged under its leader, and concerting measures in opposition to one another."[30] Regardless of whether the Founders' fears were politically naive, unreasonable, or unfounded, it is fair to conclude that the Founders evinced no particular theory of party politics, let alone one desiring continuous two-party domination of American politics.[31]

The Supreme Court, in *Smiley v. Holm*,[32] interpreted the Elections Clause as allowing states to adopt the procedural safeguards necessary

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24 *See* JOSEPH STORY, ON THE CONSTITUTION § 816 (1858).

25 *Id.* § 817.

26 Tashjian v. Republican Party, 479 U.S. 208, 217 (1986).

27 *See* James L. Sundquist, *Strengthening the National Parties, in* Elections American Style, supra note 7, at 195, 197 (noting that parties were denounced for the "corruption" of legislatures).

28 *Id.* As James Sundquist explained, "Madison advanced as one of the Constitution's central merits that it would tend 'to break and control the violence of faction,' which he equated with party." *Id.* at 198 (quoting THE FEDERALIST No. 10 (James Madison)). In fact, Madison felt that a greater number of parties would tend to lessen the chance that any one would gain oppressive power. *Id.* at 199.

29 REICHLEY, *supra* note 6, at 29.

30 Letter from John Adams to Jonathan Jackson (Oct. 2, 1780), *quoted in* REICHLEY, *supra* note 6, at 17.

31 *See* Lawson, *supra* note 7, at 240-41 ("Parties were heartily despised in the late eighteenth century and were not even mentioned in the constitution."). The Founders' views on parties demonstrates that there is no constitutional basis for any particular view of how courts should view parties in American Democracy. *See supra* text accompanying notes 28-31.

32 285 U.S. 355 (1932).

to run a fair election and thereby protect the constitutional right to exercise the franchise.[33] Implicitly, this constitutional delegation of power to the states did not include the power to substantively discourage or interfere with political competition among aspiring participants. Rather, it was the fear that the states would subvert the electoral process that spurred the Founders to retain the power in the federal government to supersede any state electoral law.[34] The Supreme Court recently emphasized this limitation in *U.S. Term Limits v. Thornton*:[35] "The Framers understood the Election Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional constraints."[36] Because of this limited mandate, the Elections Clause should not be understood as enabling states to imperil the rights of minor political parties. Although broad discretion exists, it is discretion laden with the potential for mischief. The states must walk a tightrope; they must ensure the fairness of elections without imperiling the ability of their own political opponents to participate in that system.

B. The Supreme Court and the Regulation of Politics

To demonstrate how the Supreme Court's jurisprudence has benefitted the major parties, but provided little benefit to the minor parties, the nature of the rights implicated by state regulation of political parties must be clear. Minor parties, of course, operate within the same framework of laws and constitutional limitations that define the relationship between the major parties and the state.[37] Disputes between states and political parties primarily involve two constitutional doctrines: (1) the "freedom of association" and (2) the "right to

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33 The Court explained:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id. at 366.

34 As Story explained: "Nor let it be thought, that such an occurrence is wholly imaginary. It is a known fact, that, under the confederation, Rhode Island, at a very critical period, withdrew her delegates from congress; and thus prevented some important measures from being carried." STORY, *supra* note 24, § 816.

35 115 S. Ct. 1842 (1995).

36 *Id.* at 1869.

37 *See, e.g.*, Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 218-19 nn.5-10 (1989) (documenting state statutes that California applied to both major and minor parties).

vote."[38] These rights are often both at issue when political parties challenge election laws.[39] In addition, there is a third doctrinal category that is analytically distinct—the Court's ballot-access jurisprudence. When states create requirements that deny or impede minor parties' ability to place their candidates' names on the ballots, the states impinge on both associational rights and voting rights. In this context, courts often consider the infringement of the parties' and voters' rights inexorably intertwined because voters associate with candidates through the act of voting; a denial of a candidate's place on the ballot thus interferes with both voting rights and associational rights.[40]

1. *Political Parties and the Freedom of Association*

The early cases that established the freedom of association were based on the First Amendment rights of free speech and peaceful assembly.[41] Once the Supreme Court recognized this right to work collectively with others in the pursuit of First Amendment goals,[42] the activities of political parties became a focal point for the right. Professor Lowenstein succinctly describes the logic leading to the First Amendment protection of political parties:

> The doctrinal argument against [state] regulation of political parties is simple and, within the conventional First Amendment framework, nearly irresistible. [First] . . . is the premise that a political party is a private organization. From this premise it follows that a party and its members, like other private organizations and their members, enjoy the First Amendment right of freedom of association. Furthermore, since on most accounts the First Amendment is centrally concerned with protection of political speech and associa-

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38 *See* Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 193-99 (1991). In some cases, the Equal Protection Clause can be implicated as well. The status of traditional equal protection analysis, which the Court relied on in Anderson v. Celebreeze, 460 U.S. 780 (1983), is uncertain. *See infra* note 115.

39 *See, e.g., Anderson*, 460 U.S. 780 (1983).

40 According to Justice Douglas:

> The right "to engage in association for the advancement of beliefs and ideas" is one activity of that nature that has First Amendment Protection. . . . [T]he right to vote [is] a "fundamental political right" that is "preservative of all rights." The rights of expression and assembly may be "illusory if the right to vote is undermined."

Williams v. Rhodes, 393 U.S. 23, 38-39 (1968) (Douglas, J., concurring) (citations omitted).

41 *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (establishing the right of a group to keep its membership rolls private); Bates v. Little Rock, 361 U.S. 516 (1960) (allowing NAACP branch to keep membership rolls private despite city ordinance requiring municipal organizations to divulge such information).

42 In Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984), the Court recognized the "freedom of expressive association" which is centrally concerned with political association.

> tion, the constitutional right of freedom of association enjoyed by a political party is especially strong in comparison with the rights of nonpolitical groups.[43]

One key weakness in this syllogism is the premise that political parties are private rather than public entities.[44] If political parties are purely private entities, then they may hold constitutional rights.[45] Under the state action doctrine, however, a purely private entity is not required to respect the constitutional rights accorded other citizens.[46] Political parties were purely private organizations from the 1790s until the Civil War.[47] Thus, "it was no more illegal to commit fraud in the party caucus or primary than it would be to do so in the election of officers of a drinking club."[48] However, due to the efforts of Robert La Follette and the Progressives, states began to treat political parties as "public agencies" during the early 1890s and 1900s; by the 1920s "most states had adopted a succession of mandatory statutes regulating every major aspect of the parties' structures and operations."[49] Because the parties were "public" under conventional constitutional doctrine, the courts "deprive[d] the parties of the protections of the Bill of Rights."[50] By the 1970s, federal courts considered "virtually every aspect of the party's presidential nomination process . . . state action,"[51] and thus, subject to state regulation.

At the same time, however, the Court issued a number of decisions that treated political parties as private organizations that held First Amendment rights.[52] By recoguizing that political parties are holders of First Amendment rights in some circumstances, the Court created a dilemma—parties could be both public and private entities depending on the particular activity in question.[53] If political parties were truly private organizations, they could exclude whomever they wished from political participation—a result that would conflict with

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43 Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1745-46 (1993) (footnotes omitted).

44 *See id.* at 1748.

45 *See id.*

46 *See id.*

47 *See* AUSTIN RANNEY, CURING THE MISCHIEF OF FACTION: PARTY REFORM IN AMERICA 78 (1975).

48 *Id.* at 78-79 (quoting V.O. KEY, POLITICS, PARTIES & PRESSURE GROUPS 375 (1964)).

49 *Id.* at 79-81.

50 Lowenstein, *supra* note 43, at 1748.

51 Andrew Pierce, *Regulating Our Mischievous Factions: Presidential Nominations and the Law*, 78 KY. L.J. 311, 317 (1990).

52 *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477, 487-91 (1975) (holding that freedom of association protected the right of a national political party to select delegates to a political convention against a state intervention); O'Brien v. Brown, 409 U.S. 1, 4-5 (1972) (questioning whether the actions of party committee were state actions).

53 *See* Lowenstein, *supra* note 43, at 1748-49; *see also* Duke v. Cleland, 87 F.3d 1226, 1231 (11th Cir. 1995) (noting that party leaders acted both as state actors and as party representatives).

the "White Primary Cases" in which the Court protected racial minorities' right to participate in party primaries.[54] Since overt racial discrimination has subsided in the South, however, courts have limited the White Primary cases to that specific context and now generally treat political parties as private actors that are protected by the Constitution, although there are exceptions.[55] The question of when a political party will be treated as a private organization, and therefore not subject to the Bill of Rights, remains unsettled.[56] The Supreme Court jurisprudence has located political parties "roughly midway between conventional public and private institutions, attributing to parties elements of both."[57] When courts treat parties as private entities, however, they strengthen major-party claims that states may not regulate their affairs.

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54 *Cf.* Gray v. Sanders, 372 U.S. 368 (1963) (finding state action when the state enforces exclusion of voters); Terry v. Adams, 345 U.S. 461, 469-70 (1953) (holding that the use of a discriminatory preprimary election administered by a private association, which determined the primary winner, constituted state action under the Fifteenth Amendment); Smith v. Allwright, 321 U.S. 649 (1944) (determining that political party's exclusion of African-American voters in primary constitutes state action); United States v. Classic, 313 U.S. 299 (1941) (holding that Congress can regulate fraud in primary elections); Nixon v. Condon, 286 U.S. 73 (1932) (finding that party's exclusion of black voters when authorized to determine voter qualifications constitutes state action).

55 *See* Michael L. Stokes, *When Freedoms Conflict: Party Discipline and the First Amendment*, 11 J.L. & POL. 751, 769-72 (1995). However, the Court recently relied on the "White Primary Cases" to find that a political party is a state actor when it delegates authority to a party to select candidates through a party convention. *See* Morse v. Republican Party, 116 S. Ct. 1186, 1195-96, 1207-08 (1996) (describing when political parties are state actors and holding that section 5 of the Voting Rights Acts applies to them).

56 In *Republican Party v. Faulkner County*, the Eighth Circuit noted that:

> The central tension underlying all [associational rights] cases is that of the public/private distinction: should political parties be treated as private associations of common interest properly free from the intrusive hand of state regulation, or as quasi-official public institutions integral to the success and stability of American representative democracy, or as something in between?

49 F.3d 1289, 1292 (8th Cir. 1994); *see also* Federspiel v. Ohio Republican Party State Cent. Comm., 85 F.3d 628 (6th Cir. 1996) (noting that political parties are "private organization[s] occasionally regulated by state law and occasionally delegated state authority"). The public/private distinction still pervades commentators thinking on the state regulation of political parties. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.33(b), at 846-50 (4th ed. 1991); Kevin R. Puvalowski, Note, *Immune From Review?: Threshold Issues in Section 1983 Challenges to the Delegate Selection Procedures of National Political Parties*, 62 FORDHAM L. REV. 409, 411-18 (1993) (discussing state action and the White Primary cases). *See generally* Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Procedures*, 57 S. CAL. L. REV. 213 (1984) (analyzing whether party nominations constitute state action).

57 *Faulkner*, 49 F.3d at 1295.

The freedom of association is centrally a freedom to advance shared beliefs.[58] Political parties are large complex organizations.[59] The party determines the content of its "beliefs" (the policies the party advocates) through the resolution of intraparty disputes with the application of party rules.[60] Because political parties' freedom of association is a right based on the freedom of speech,[61] the major political parties have sought to insulate these internal processes from state regulation. Thus the scope of political parties' associational rights determines the extent to which the party may pursue its political interests free from state intervention in its affairs.[62]

The freedom of association is best described as a bundle of similar yet disparate and ambiguous rights. First, a political party has the external right to determine the boundaries of its association,[63] which includes the freedom to identify the membership of the association and to exclude others from the association.[64] The right also encompasses a political party's decisions regarding the process for electing its leaders.[65] For example, a state cannot compel a national political party to accept the results of state-run primaries that were adminis-

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58 *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973); *see also* Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 YALE L.J. 117, 124 (1984).

59 *See* WILLIAM J. KEEFE, PARTIES, POLITICS AND PUBLIC POLICY IN AMERICA 20 (7th ed. 1994).

60 *See* San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814, 827 (9th Cir. 1987) ("[T]he right of association would be hollow without a corollary right of self-governance . . . ."), *aff'd*, 489 U.S. 214 (1989); *see also* Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) ("[A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution . . . .").

61 As Justice Kennedy explains:

> The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs. A party performs this function in part by "identify[ing] the people who constitute the association, and . . . limit[ing] the association to those people only." Having identified its members, however, a party can give effect to their views only by selecting and supporting candidates.

Colorado Republican Campaign Comm. v. Federal Election Comm., 116 S. Ct. 2309, 2322 (1996) (Kennedy, J. dissenting) (citations omitted).

62 *See, e.g.*, Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) (invalidating statutes regulating internal party organization); Tashjian v. Republican Party, 479 U.S. 208 (1986) (invalidating state law conflicting with state party rule requiring an open primary).

63 *See Eu*, 489 U.S. at 224.

64 For example, a state requires a compelling state interest to interfere in the parties' selection of delegates to party conventions. *See* Cousins v. Widoga, 419 U.S. 477, 491 (1975).

65 *See Eu*, 489 U.S. at 229.

tered in conflict with party rules.[66] The essence of this right is that a state "may not constitutionally substitute its own judgment for that of the Party"[67] or abridge the party's ability "to select 'a standard bearer who best represents the party's ideologies and preferences.'"[68]

It remains unclear how far these rights extend in the context of party regulation.[69] However, the Supreme Court's jurisprudence has raised two intertwined and related issues of particular importance: (1) the extent to which political parties can control the participation of candidates and individuals whose views conflict with the party establishment, and (2) how much legal power parties have to enact procedures that provide the party with a strong influence over the nomination of candidates.

2. *The Right To Vote*

The second doctrine limiting the state's power to regulate political parties is the "fundamental right" to vote. The Supreme Court has often invoked dramatic aphorisms to express the importance of voting in a democracy: "It is beyond cavil that 'voting is of the most fundamental siguificance under our constitutional structure.'"[70] Invalidating a racially biased apportionment scheme, the Court noted that "[n]o right is more precious in a free country than that of having

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66 *See* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 126 (1980). However, it is unclear whether a state-mandated blanket primary, which places all primary candidates on a single ballot and allows participation of all voters without regard to party affiliation, can withstand a challenge by a party seeking a closed ballot. *See* O'Callaghan v. State, 914 P.2d 1250 (Alaska 1996) (holding that under *Tashjian*, 479 U.S. 208, the open blanket primary statute is constitutional because the system is reasonable and nondiscriminatory), *petition for cert. filed*, 64 U.S.L.W. 3839 (U.S. June 4, 1996) (No. 95-1962); Heavey v. Chapman, 611 P.2d 1256, 1259 (1980) (holding blanket primaries constitutional because they encourage voter participation and maximize voter choice). Although these two state courts have decided otherwise, the results are highly questionable because the state essentially forces parties to allow nonparty members to select its leadership. This fact seems to go to the heart of a political party's associational rights. *See O'Callaghan*, 914 P.2d at 1268 (Rabinowitz, J., dissenting).

67 *La Follette*, 450 U.S. at 123-24.

68 *Eu*, 489 U.S. at 224 (quoting Ripon Society, Inc. v. National Republican Party, 525 F.2d 567, 601 (D.C. Cir. 1975)). Underlying the Court's jurisprudence is a desire to encourage parties to elect representative candidates. *See id.* at 217 n.4 (providing the example of Tom Metzger, a former Grand Dragon of the Ku Klux Klan, winning the Democratic Party's nomination for the United States House of Representatives). Similarly, the *La Follette* Court stated that "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions . . . and that political parties may accordingly protect themselves from 'intrusion by those with adverse political principles.'" 450 U.S. at 122 (citations omitted).

69 *See infra* Part I.C.1.b. (discussing the recent extension of associational rights).

70 Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)).

a voice in the election of those who make the laws. . . . Other rights, even the most basic, are illusory if the right to vote is undermined."[71]

Although the court has recognized a constitutionally protected right to vote,[72] the right lacks a clear basis in the text of the Constitution.[73] The existence of individual voting rights as a substantive limitation on state power to regulate elections evolved from the racial gerrymandering cases, in which voting districts were drawn with the purpose of diluting the political power of specific racial groups.[74] A consonance exists between gerrymandering on the basis of race and the impermissible regulation of minor parties. In gerrymandering cases, the right purportedly at stake is the right of each voter to have their vote carry equal weight in determining the composition of the legislature.[75] The "one man, one vote" principle protects against the dilution of voting power along group lines.[76] Similarly, it is the quality of individual voters' political participation that defines right-to-vote controversies in the political party context.[77] Like the pernicious manipulation of district lines, state regulations that interfere with minor parties' ability to participate in the political process impinge on "the right of qualified voters, regardless of their political persuasion, to cast

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71 Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

72 *See* Anderson v. Celebrezze, 460 U.S. 780 (1983) (referring to voting rights of voters as "fundamental").

73 As Emily Calhoun noted:

> Unambiguous guidelines for deciding whether voting is a fundamental right are not to be found in the text of the Constitution . . . . On the basis of the same constitutional text and related historical materials, scholars have argued both for and against the proposition that the vote is a fundamental right under the Constitution.

Emily Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN. L. REV. 549, 554 (1985). *See also* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 334 (1993) (noting that the right to vote can be based on "several constitutional amendments prohibiting denial of the franchise" or the fundamental rights strand of equal protection analysis). The constitutional basis for the right to vote will vary depending on the particular context. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626-29 (1969) (finding that once a state grants the franchise to residents on a selective basis, the Court must determine whether the state's distinctions are consistent with the Equal Protection Clause); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (stating that the right to vote in federal elections is conferred by Art. I, § 2 of the Constitution).

74 For example, the Supreme Court relied on the gerrymandering decisions when the Court first struck down a state ballot-access provision challenged by a third party. *See* Williams v. Rhodes, 393 U.S. 23, 31 n.8 (1968).

75 *See* Reynolds v. Sims, 377 U.S. 533, 562-63 (1964).

76 *See* Shaw v. Reno, 509 U.S. 630, 640 (1993).

77 *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1711-12 (1993) (describing voting rights as a right of participation in the political process).

their votes effectively."[78] Sometimes the right has been described as the right to a "meaningful" vote.[79]

Although the Court has expansively asserted that the right to vote is "heavily" burdened when minor parties are denied ballot access,[80] not all voters can be assured that their favored candidate will appear on the ballot.[81] As a result, although in certain contexts courts will subject any impairment of the fundamental right to vote to strict scrutiny,[82] such scrutiny is certainly not the rule when states regulate political parties and minor-party ballot access.[83]

C. Early Court Interventions

In 1968, the Court entered the struggle between states and minor parties decidedly on the minor parties' side. In *Williams v. Rhodes*,[84] the Ohio American Independent Party formed to place former Alabama Governor George Wallace on ballot as a presidential candidate, and in a truly Herculean effort, collected 450,000 signatures—fifteen percent of the state's voters.[85] Although the party had gathered the statutorily required number of signatures, it submitted them after a state-imposed deadline, and thus, the Secretary of State rejected them.[86] In a last second appeal challenging the state's action, the

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78 Williams v. Rhodes, 393 U.S. 23, 30 (1968). The case has been the subject of a considerable amount of debate and criticism. *See, e.g.*, Richard P. Roberts, Note, *Ballot Access for Third Party Candidates After* Anderson v. Celebrezze, 3 J.L. & POL. 127, 129-31 (noting the later difficulties *Williams* caused).

79 *See* Burdick v. Takushi, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting).

80 *See Williams*, 393 U.S. at 31. A number of academic commentators interpreted the potential reach of the *Williams* decision as creating a right to candidacy that threatened to invalidate any state regulation that barred a candidate supported by a voter. *See Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1134 (1975) [hereinafter *Developments*]. *See* Clements v. Fashing, 457 U.S. 957, 963 (1982).

81 As the Supreme Court recognized, "[A] voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. This does not mean every voter can be assured that a candidate to his liking will be on the ballot . . . ." Lubin v. Panish, 415 U.S. 709, 716 (1974).

82 *See* 3 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 18.31 (2d ed. 1992 & Supp. 1995); Jeffrey G. Hamilton, Comment, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1558 (1994); *see also* Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L.J. 1615, 1626 (1987) ("In reapportionment, voter qualification, and candidate ballot access cases, the Supreme Court has affirmed that 'any restriction' on the right to vote triggers heightened scrutiny.").

83 *Burdick*, 504 U.S. at 432 (noting "the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny"); *see also infra* text accompanying notes 247-60.

84 393 U.S. 23 (1968). *See generally* Porto, *supra* note 4, at 289-91 (providing a detailed discussion of the *Williams* decision).

85 *See Williams*, 393 U.S. at 26.

86 The State enacted a deadline for signature petitions nine months before the election. *See id.* at 26-27.

Court struck down the "totality of the Ohio restrictive laws,"[87] holding that they violated the freedom to associate for the advancement of political beliefs, and voters' right to vote "effectively."[88] The Court applied strict scrutiny, found that the restriction constituted "invidious discrimination, and required the state to put forth compelling interests to justify the restrictions."[89] *Williams* thus established that the constitutional rights of minor parties and their supporters imposed a substantive limitation on states' power to regulate political activity and political parties.

Over the next fifteen years the Court's scrutiny of state ballot regulations intensified. The Court heard a series of ballot-access challenges involving state-mandated candidate filing fees,[90] large signature requirements to place candidates' names on the ballot,[91] minor-party nomination procedures,[92] party disaffiliation requirements for independent candidates,[93] and notarization of petition signatures.[94] Minor parties enjoyed some notable successes invalidating the most unreasonable state ballot-access restrictions.[95]

Soon, however, the Court retreated from the broad implications of its *Williams* decision. In *Jenness v. Fortson*,[96] the Court chose not to apply strict scrutiny and upheld Georgia's requirement that a candidate gather the signatures of five percent of the state's registered voters.[97] The Court reasoned that because Georgia's ballot access laws were less onerous in some ways than Ohio's laws—the state required signatures from five percent of the electorate as opposed to fifteen percent—they did not operate to "freeze the status quo" and were therefore constitutional.[98] In the cases following *Williams*, the Court upheld ballot access laws that imposed considerable costs on minor

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87 *Id.* at 34.

88 *Id.* at 30. The Court relied on an equal protection analysis to assess the constitutionality of the regulations. *See id.* at 28.

89 *Id.* at 31-32.

90 *See* Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

91 *See* Jenness v. Fortson, 403 U.S. 431 (1971).

92 *See* American Party v. White, 415 U.S. 767 (1974).

93 Party disaffiliation statutes require that an independent candidate be unaffiliated from a political parties for a certain amount of time before he or she can run. *See* Storer v. Brown, 415 U.S. 724 (1974).

94 *See American Party*, 415 U.S. at 785.

95 *See infra* note 384.

96 403 U.S. 431 (1971).

97 *See id.* at 440-42.

98 *Id.* at 438. Although the holdings in *Jenness* and *Williams* seem reasonable in light of the lower percentage of signatures required in Georgia, this fact is deceiving. Georgia's law was based on registered voters, which is a much larger pool of voters than the number who voted in the last election. Also, the state required a very successful showing in the election (20% of the vote) to retain ballot status and required separate petitions for each candidate. For a more complete discussion of these cases see Smith, Note, *supra* note 38, at 181-86.

parties.[99] In addition, these cases created confusion because the Court failed to specify what level of scrutiny lower courts should apply in ballot-access challenges.[100]

The Court also decided a series of cases brought by the Democrats and Republicans challenging state laws that regulated their internal political activities. These cases did not involve state barriers to ballot access, but instead involved state laws that "circumscribe[d] the discretion" of the major political parties to govern themselves without state interference.[101] For example, political parties and voters challenged state laws involving equal representation in party nominations,[102] the precedence of party rules over state law in delegate selection,[103] and state requirements that voters declare their party affiliation months ahead of party primaries in order to participate.[104] These cases defined the early legal interests of the minor and major parties. Minor parties sought access to the political system on election day, while the major parties sought freedom from state intervention into party political activities.

Like the minor parties, the Democrats and Republicans used the courts to invalidate state restrictions on their activities with mixed success. In general, the Supreme Court upheld mild restrictions on their associational interests if justified by legitimate state interests, while the Court allowed substantial encroachments upon these rights when necessary to further a compelling state interest.[105] For example, the Court upheld statutes that prohibited voters from voting in a party primary unless they had enrolled as a party member eight months prior to the primary on the grounds that the statutes served the state's compelling interest in preventing party raiding—the practice of or-

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99 *See* Storer v. Brown, 415 U.S. 724 (1974) (remanding to the district court to decide whether a five-percent (325,000 signatures) petition requirement in California constituted an undue burden); American Party v. White, 415 U.S. 767 (1974) (upholding Texas's electoral scheme that required minor parties either to receive two percent of the vote in the general election or gather signatures from one percent of the state's registered voters). Commentators observe that these cases present serious difficulties for third parties seeking ballot access. *See, e.g.*, Smith, Note, *supra* note 38, at 186 (claiming that *Jenness* "was a disaster for third party and independent candidates" because it "set virtually no upper limit as to how significant a showing of support a state could require before granting access").

100 *Jenness* never indicated a standard of review, and *Storer* and *American Party* seemed to apply an mix of minimal and strict scrutiny. *See* TRIBE, *supra* note 14, at 1106-08 (analyzing the courts doctrine in these cases and characterizing the doctrinal inconsistency as "baffling").

101 TRIBE, supra note 14, § 13-22, at 1112.

102 *See* Gray v. Sanders, 372 U.S. 368 (1963) (holding that state law creating primary system violating "one-person, one-vote rule" was invalid).

103 *See* O'Brien v. Brown, 409 U.S. 1 (1972) (reversing decision allowing seating of California delegates to better reflect vote distribution in state).

104 *See* Kusper v. Pontikes, 414 U.S. 51 (1973) (holding that twenty-three month affiliation requirement was unconstitutional).

105 *See* TRIBE, *supra* note 14, at 1113-15.

ganized groups of voters from one party participating in the election of another with the hopes of electing a weak candidate.[106] Similarly, the Court allowed some direct interference in parties' internal party affairs. In *Marchioro v. Chaney*,[107] for example, the Court upheld a state law mandating that each major political party establish a state committee made up of two individuals from each county.[108] At the same time, the Court did afford the national parties some protection from state interference. For example, the Court held that the states could not force national parties to accept the results of primaries that used procedures in conflict with party rules.[109]

These cases demonstrate that the Court's early intervention into the state regulation of political parties did not clearly benefit major parties over minor parties. As Austin Ranney noted, although the national party received some autonomy from state regulation, it was clear that "state legislatures [had] the constitutional power to regulate state and local parties' internal affairs."[110] At the same time, although minor parties clearly benefitted from the Court's intervention in striking the most serious legal and clearly antidemocratic barriers to ballot access, the Court's retreat in *Jenness* left the states considerable discretion to frustrate their participation in the political process.

1. *Balancing the Constitutional Rights of Minor Parties Against the State's Interest in Regulating Elections:* Anderson v. Celebrezze

One problem with the Court's early doctrine in the regulation of politics was its refusal to establish a clear methodology for resolving cases involving political parties.[111] In *Anderson v. Celebrezze*,[112] the Court used the constitutionality of early filing deadlines to articulate a new mode of analysis in these cases. In late April 1980, John Anderson announced an independent bid for the Presidency. In Ohio, Anderson submitted the required nominating petitions nearly two months after the statutory deadline for submission had passed.[113]

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106 *See* Rosario v. Rockefeller, 410 U.S 752 (1973). *But cf.* Kusper v. Pontikes, 414 U.S. 51 (1973) (invalidating 23 month period and distinguishing *Rosario* on differing amount of time involved).

107 442 U.S. 191 (1979).

108 *See id.* at 193-94.

109 *See* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981) (holding that the national party may refuse to seat delegates elected in state-mandated open primary); Cousins v. Wigoda, 419 U.S. 477 (1975) (finding that the national Democratic Party did not need to seat delegates elected by Illinois state law that conflicted with party rule at 1972 Democratic National Convention).

110 RANNEY, *supra* note 47, at 92.

111 *See* TRIBE, *supra* note 14, § 13-20, at 1102-08 (reviewing cases and discussing the "doctrinal enigmas that bedevil the law of ballot access").

112 460 U.S. 780 (1983).

113 *See id.* at 782.

The Sixth Circuit upheld the deadline, reasoning that it ensured voters had an adequate opportunity to take a close look at the candidates, however, the Supreme Court reversed.[114] Declaring the state laws unconstitutional, the *Anderson* Court based its conclusions directly on the First and Fourteenth Amendments.[115] Repeating the theme from *Williams*, the Court found that the filing deadline burdened the right of individuals to associate and to cast their votes effectively.[116] Again, the right to vote was "heavily burdened" if a voter could only vote for major-party candidates when other parties or candidates were competing for the ballot.[117]

In an attempt to clarify the analysis, the Court formulated the following balancing test:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments. It . . . must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[118]

Noting that constitutional challenges to election laws "cannot be resolved by any 'litmus-paper test,'"[119] the Court concluded that the deadline limited the choices for disaffected voters reacting to issues that emerged late in a campaign.[120] In addition, the deadline placed

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114 *See id.* at 783-86.

115 Unlike *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court did not engage in a separate Equal Protection Clause analysis. *See Anderson*, 460 U.S. at 786 n.7. The Court did, however, explicitly rely on previous cases applying the "fundamental rights" strand of the equal protection analysis. *See id.* (citing cases). Some commentators assert that the Anderson court abandoned the equal protection analysis of ballot access restrictions. *See* Porto, *supra* note 4, at 301; Jacqueline Ricciani, Note, Burdick v. Takushi: *The* Anderson *Balancing Test to Sustain Prohibitions on Write-in Voting*, 13 PACE L. REV. 949, 965 (1994). Since *Anderson*, however, a number of courts have utilized equal protection analysis to scrutinize state election laws. *See* Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992) (citing cases and discussing the ambiguities in *Anderson* that seem to allow equal protection challenges to state election law, but subsuming such claims under the *Anderson* balancing test); Manifold v. Blunt, 493 F.2d 1368, 1373 (8th Cir. 1988) (noting the confusion over the appropriate standard of review and applying strict scrutiny to an equal protection challenge to filing dates for minor parties).

116 *See Anderson*, 460 U.S. at 787.

117 *See id.*

118 *Id.* at 789. The test enunciated in *Anderson* was a striking departure from the Court's earlier approach. *See* Richard P. Roberts, Note, *Ballot Access for Third Party and Independent Candidates After* Anderson v. Celebrezze, 3 J.L. & POL. 127, 132-34 (1986) (reviewing the history of *Anderson*).

119 *Anderson*, 460 U.S. at 789.

120 *See id.* at 792.

a disproportionate burden on political groups whose members shared a particular viewpoint and associational preference, and thus, was difficult to justify—"[i]t discriminates against . . . those voters whose political preferences lie outside the existing political parties."[121]

Despite the Court's apparently powerful rhetoric concerning the rights of third parties, and compared with the Court's application of strict scrutiny in *Williams*, the due process approach "balance[s] State interests against voters' First Amendment rights instead of almost automatically subordinating the former to the latter."[122] When the Court later upheld Hawaii's ban on write-in voting in *Burdick v. Takushi*[123] in 1992, holding that the ban imposed a "limited burden" on the right to vote, the Court expounded further on the application of the *Anderson* test:

> [When minor party] rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" . . . "the State's important regulatory interests are generally sufficient to justify" the restrictions.[124]

Following *Burdick*, the *Anderson* balancing test has been described as a three-tiered model of analysis, in which severely burdensome restrictions receive strict scrutiny, less problematic laws serving legitimate state objectives are balanced against the party's or voter's interests, and rational basis review is used for other more benign regulations.[125] The central issue in this analysis is how the courts charac-

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121 *Id.* at 793-94. Against this injury, the Court weighed the state's interest in (1) voter education, (2) equal treatment of all candidates, and (3) political stability. The Court rejected these interests, claiming either that they had no merit, or were not advanced by the early deadline. *See id.* at 796-806.

122 Porto, *supra* note 4, at 302.

123 504 U.S. 428.

124 *Id.* at 433 (citation omitted).

125 *See* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 917 (1994); *see also* McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) (interpreting *Burdick* to mean that a "regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor"), *cert. denied*, 116 S. Ct. 1320 (1996).

Considerable disagreement exists over whether *Burdick* creates a three- or two-tiered model, or a pure balancing test. Some courts either apply strict scrutiny or inquire whether the law is "reasonable." These courts do not indicate whether there is a "middle" level of review. *See, e.g.*, Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994); Duke v. Smith, 13 F.3d 388, 394 (11th Cir. 1994); Signorelli v. New York State Bd. of Elections, No. 95-CV-1026, 1995 WL 548712, at *7 (N.D.N.Y. Sept. 11, 1995). Similarly, some courts do not indicate whether there is a middle level of review, but appear to interpret "reasonable and non-discriminatory" to mean traditional minimal scrutiny. *See, e.g.*, Libertarian Party v. Munro, 31 F.3d 759, 761 (9th Cir. 1994); Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992); New Alliance Party v. New York State Bd. of Elections, 861 F. Supp. 282, 294 (S.D.N.Y. 1994). Finally, some courts hold that the scrutiny a law receives is directly pro-

terize the burden a statute imposes on the major or minor party. However, the new test appeared to strengthen the hand of the state in regulating minor political parties because it required a showing that the law "severely" burdened a party's interest—a showing that clearly required more than the ability of the party faithful to vote for their chosen candidate.

a. *The Application of* Anderson *to State Laws Regulating Minor Parties*

Following *Anderson*, the Supreme Court intervened to protect the interests of minor parties only when the state law at issue was arguably irrational or served no legitimate purpose. The Court upheld state laws burdening minor parties as long as they were rationally related to the state's interest in controlling "frivolous" candidacies.[126] In *Norman v. Reed*,[127] the Harold Washington Party challenged an Illinois law that required a new party to gather 25,000 nominating signatures in both electoral districts of a county.[128] The party had gathered a total of 50,000 signatures as required, but only 8,000 were obtained in one of the districts. The state supreme court rejected the nominating Illinois petitions,[129] which disqualified the entire state of the party's candidates. Although the Court did not disapprove of the absolute number of signatures required, the Court struck down the law because it required more signatures for a candidate to enter a local election than a statewide election.[130] If collecting 25,000 signatures established the required showing of electoral support for ballot access in a statewide race, the Court reasoned that the state did not have a strong interest in requiring more for a local race.[131] By comparison, in *Munro v. Socialist Workers Party*,[132] the Court upheld Washington's system that required that minor-party candidates receive one percent of the total vote in a statewide open primary before being placed on the general election ballot.[133] Although the system effectively eliminated minor parties from the general election ballot—only one minor-party candidate ever had achieved ballot status under the system[134]—the Court did not consider the scheme burdensome because the system pro-

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portional to the burden it imposes on a minor party. *See, e.g.*, Patriot Party v. Mitchell, 826 F. Supp. 926, 934 (E.D. Pa. 1993).

126 *See* Porto, *supra* note 4, at 308-10.

127 502 U.S. 279 (1992).

128 *See id.* at 282-87.

129 *See id.* at 284.

130 *See id.* at 293.

131 *See id.* (noting that "it requires elusive logic to demonstrate a serious state interest in demanding such a distribution for new local parties").

132 479 U.S. 189 (1986).

133 *See* 3 Rotunda & Nowak, *supra* note 82, § 18.32, at 424.

134 *See Munro*, 479 U.S. at 196-97.

vided at least some access to a statewide ballot, even if it was not in the general election.[135] These cases provided little protection for minor party interests against state regulation because under *Anderson* a law imposed a severe burden only when clearly irrational, but an electoral scheme could survive even if it precluded all minor-party candidates from qualifying for the general election ballot.

b. *The Application of* Anderson *to State Laws Regulating Major Parties*

Since *Anderson*, the Court has relied on the associational rights of major parties to invalidate state laws that interfere with the Democratic and Republican parties' political activities. These cases contrast sharply with the treatment of minor parties under the doctrine. In *Tashjian v. Republican Party*,[136] the Court explicitly relied on the associational rights of parties to invalidate a Connecticut law that required the major political parties to hold "closed" primaries in which only party members were allowed to participate.[137] Later, in *Eu v. San Francisco County Democratic Central Committee*,[138] the Court invalidated a series of California laws that heavily regulated the internal organizational structure of political parties and prohibited the party from making endorsements in party primaries.[139] Because the statutes limited how the party organized itself, they "burdened" the party's associational rights, and therefore, the Court required the state to articulate a compelling interest.[140] Notably, the Court failed to clearly articulate the severity of the burden imposed by the regulations, which usually determines whether the Court applies strict scrutiny.[141] As a result, some lower courts have read *Eu* as requiring a lower burden to invoke strict scrutiny in party autonomy cases.[142] These cases introduced a distinction into the Supreme Court's jurisprudence: the Court clearly applied strict scrutiny to state laws that regulated the internal affairs of major state political parties and restricted their political activities, but it applied an easier standard when minor parties challenged ballot

135 *See id.* at 206 (Marshall, J., dissenting).

136 479 U.S. 208 (1986).

137 *See id.* at 214.

138 489 U.S. 214 (1989).

139 *See id.* at 229.

140 *See id.* at 229-31.

141 *See id.*

142 *See* Republican Party v. Faulkner County, 49 F.3d 1289, 1297 (8th Cir. 1995) ("[T]he Supreme Court has suggested that a law which imposes *any appreciable burden* on rights of association, expression and voting demands strict scrutiny . . . .") (emphasis added) (citing Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989)). Because of this uncertainty, some courts still express concern over what standard to apply. *See, e.g.*, Duke v. Cleland, 884 F. Supp. 511, 517 (N.D. Ga. 1995) ("Though the court does not believe plaintiffs' rights were 'heavily burdened,' the court recognizes that . . . a contrary interpretation might not obtain."), *aff'd*, 87 F.3d 1226 (11th Cir. 1996).

access laws, unless those laws were irrational or served no legitimate purpose.

D. The Lower Courts Use of Associational Rights and Right-to-Vote Doctrine to Protect the Interests of the Major Political Parties

Recent courts of appeals decisions applying both the Supreme Court's right-to-vote and First Amendment jurisprudence have strengthened the major party organizations as political actors. As late as the 1970s, popular participation in party primaries was of little political consequence and the party leadership held considerable sway over the nominating process.[143] In other words, candidates were not elected without the support of the party leadership.[144] The broad enactment of direct primaries, in which a party's members vote to select nominees, seriously damaged the influence of state parties in the electoral process by "taking away control over its most precious possession, the right to bear its label."[145] Among other unintended effects, the direct primary system made it difficult for the party to influence candidates with independent power bases and created "opportunities for people hostile to party leadership and party policies to capture nominations."[146] By the late 1970s, political scientists concluded that, for a variety of reasons, parties were "declining, decaying or atrophying,"[147] and had lost most of their influence in candidate nominations.[148] In response, in the early 1980s, the major parties started to reform their internal processes in order to increase their influence in the nomination process.[149] Because many state regulations restricted the parties' electoral activities, they needed to accompany these reforms with a legal strategy designed to "use the courts as the instruments of deregulation."[150]

The three cases reviewed in this section illustrate that the legal strategy is paying political dividends. Relying on *Eu* and *Tashjian*, lower federal courts recently utilized the associational rights cases to

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143 *See* KEEFE, supra note 59, at 115 (noting that candidates "spent much of their time cultivating key state party leaders," and "[p]residential nominees were chosen in a relatively closed system from among a very select group").

144 *See* REICHLEY, *supra* note 6, at 140-60 (describing "machine" politics).

145 RANNEY, supra note 47, at 125.

146 KEEFE, supra note 59, at 94-95.

147 Ceaser, *supra* note 5, at 87.

148 *See id.* at 103-06.

149 In the presidential primaries, these reforms included setting aside unpledged delegates for party leaders and elected officials selected outside the state primaries and dropping the requirement of proportional representation when delegates are awarded. *See id.* at 110.

150 Ceaser, *supra* note 5, at 128; *see also* Lowenstein, *supra* note 43, at 1744 (noting the "use of litigation to expand the immunity of parties from state regulation").

strengthen the ability of major parties to exclude voters and candidates with views inconsistent with the party's ideology, resist state laws that usurp the party's control over its internal affairs, and increase party influence in the nomination process.

1. *The Constitutionality of State Candidate Committees:* Duke v. Cleland

The Eleventh Circuit recently addressed the issue of whether political parties can exclude from participation in party primaries candidates who hold views that are inconsistent with the party's ideology. In *Duke v. Cleland*,[151] the Eleventh Circuit relied on political parties' associational rights to approve the use of state presidential candidate selection committees to control candidate access to the party primary ballot.[152] Under Georgia state law, a committee comprised of the party's two leaders in the legislature and the chairperson of the state party chooses which names are placed on the primary ballot.[153] If all three party members on the committee agree that a name should not be put on the ballot, the Secretary of State simply does not print the name on the ballot.[154]

Before the 1992 Georgia Republican Presidential Primary, David Duke, a former Ku Klux Klan member and white supremacist, sought to participate in the election, but the party committee voted to reject his attempt to gain access to the ballot.[155] Duke claimed that his associational rights, and the rights of his supporters to vote for him, were violated because "the Republican members of the Committee excluded [him] from the Republican primary ballot because of his polit-

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151 954 F.2d 1526 (11th Cir. 1992).

152 *See id.* at 1533. The procedural history of *Duke v. Cleland* is tortured and complex. First, Duke claimed that the actions by the State Committee and the Secretary of State violated his constitutional rights, and requested a temporary restraining order, preliminary injunction, and permanent injunction pursuant to 42 U.S.C. § 1983 to prevent the printing of the primary ballots. The district court denied the temporary restraining order and the injunction. *See* Duke v. Cleland, 783 F. Supp. 600 (N.D. Ga.), *aff'd*, 954 F.2d 1526 (11th Cir. 1992) (*Duke I*). Duke then filed an amended complaint and asserted an additional claim under 42 U.S.C. § 1983 that challenged the validity of the Georgia presidential primary candidate selection statute itself. *See* Duke v. Cleland, 5 F.3d 1399 (11th Cir. 1993) (*Duke II*). The district court dismissed the case on the ground that there was no state action, but this finding was overturned on appeal. The court of appeals found that the candidate selection committee was "an arm of the state" and thus their decision constituted state action, but the court could not decide the merits of the action on the record provided by the lower court. *See id.* at 1404-06. On remand, the district court held that the candidate selection statute was constitutional, and the Eleventh Circuit affirmed. *See* Duke v. Cleland, 884 F. Supp. 511, 517 (N.D. Ga. 1995), *aff'd sub nom.* Duke v. Massey, 87 F.3d 1226 (11th Cir. 1996) (*Duke III*).

153 *See Duke*, 954 F.2d at 1533.

154 *See id.*

155 *See id.* at 1527.

ical beliefs."[156] The essential issue in the case was simple: did the party's right to determine the boundaries of its association trump Duke's right to associate with the party of his choice?[157]

The Eleventh Circuit resolved this conflict squarely in the party's favor. According to the Court, the Republican party's right to identify its own associational boundaries meant that Duke himself had no right to associate with the party.[158] To support its analysis the court cited *Democratic Party v. Wisconsin ex rel. La Follette*,[159] for the proposition that states have a strong interest in protecting political parties from "adverse political principles,"[160] and in "maintaining the autonomy of political parties."[161] The court rejected Duke's supporters' claim that his exclusion burdened their right to vote, by noting that they could vote for him as an independent or third-party candidate, although as a factual matter this was not entirely clear.[162] The Court noted further that "a strong argument could be made that there is no right to vote for any particular candidate in a party primary, because the party has a right to select its candidates."[163] The statute vindicated state interests that were "legitimate and compelling"; thus, even under strict scrutiny, the party and state were likely to prevail.[164] The court concluded, "Duke [had] no right to associate with the Republican Party if the Republican Party ha[d] identified Duke as ideologically outside the party."[165]

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156 *Id.* at 1530. The Georgia Republican Party Chairman, Alec Poitevint, admitted that the party denied Duke because of his political views: "'There is no room for disciples of Hitler on the Republican presidential ballot.'" *Duke*, 5 F.3d at 1404 n.5. 1993).

157 *See id.*

158 *See id.* at 1532.

159 The actual holding of the case was that a national party organization could refuse to recognize delegates selected in an open primary that allowed the participation of non-party voters. 450 U.S. 107, 123-24 (1981).

160 *Duke*, 954 F.2d at 1532.

161 *Id.* at 1531.

162 *See id.*

163 *Id.* at 1531 n.6.

164 *See id.* at 1530.

165 *Id.* at 1531. On appeal from Duke III, a different Eleventh Circuit panel (Judges Hatchett, Henderson and Mills) took the same position. *See* Duke v. Massey, 87 F.3d 1226, 1234 (11th Cir. 1996). Political scientists consider political affiliation entirely self-designated, but the *Duke* decision raises the question of whether this conclusion is accurate. Austin Ranney wrote in 1975: "[Y]ou are a Democrat if you say you are; no one can effectively say that you are not; and you can become a Republican any time the spirit moves you simply by saying you have become one." RANNEY, *supra* note 47, at 166. However, the district court took a contrary position. Duke v. Cleland, 884 F. Supp. 511 (N.D. Ga. 1995) ("If the Republican Party determines that a person is not a bona fide party member or holds views adverse to party principles, then the interest of facilitating party voting is not affected by the exclusion from the ballot of a non-party member."); *see also* Marchitto v. Knapp, 807 F. Supp. 916, 918 (D. Conn. 1993) (upholding a state statute that authorized the removal of voters from the party's roles for two years upon a showing that the voters did not support the party's principles). *But see* Fand v. Legnard, No. 31 60 63, 1994 WL 613423, at *5-10 (Conn. Super. Ct. Oct. 31, 1994) (awarding an injunction against the

The *Duke* court subtly extended the party's associational rights by allowing the state to protect one part of the party against another part of the party, rather than forcing the party to resolve a political dispute through its own internal political process.[166] A close examination of the associational rights case law reveals that these cases involved strengthening the ability of the party to resolve intraparty disputes *politically* by invalidating state laws that interfered with the party's candidate selection processes.[167] When the Supreme Court invalidated California's ban on primary endorsements in *Eu v. San Francisco County Democratic Central Committee*,[168] for example, the decision demonstrated that a party has a First Amendment right to select its candidates by campaigning within the party against candidates it finds do not adequately represent the party.[169] In contrast, in this case, the party excluded Duke without resorting to the party's internal political processes.[170] The exclusion took place before any party members were involved (except the three path leaders). Under *Duke*, a major party can deny primary ballot access to a major-party primary by the vote of three party members invested with that power under state law.[171]

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removal of a voter from the party roles because the Connecticut disaffiliation statute burdens associational rights).

166 Republican party members wished to place Duke's name on the ballot. *Duke*, 954 F.2d at 1528 n.3.

167 *Cousins v. Wigoda*, 419 U.S. 477 (1975) and *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) enabled the national party to accept or reject the results of state-run elections that did not comply with its own rules. This independence from the state strengthened a party's ability to resolve internal disputes through its own political process. As Professor Lowenstein's noted, "[i]n sum, the pre-*Tashjian* cases were susceptible to a number of plausible interpretations, but they are striking for their consistent rejection of judicial resolution of intraparty disputes." Lowenstein, *supra* note 43, at 1777.

168 489 U.S. 214 (1989).

169 *See id.* at 224-25; *see also Duke*, 954 F.2d at 1538 (Kravitch, J., dissenting).

170 As Judge Kravitch noted in dissent, if the associational rights of the political party permitted the "exclusion of candidates from a primary ballot, the very purpose of a primary would disappear." *Duke*, 954 F.2d at 1539 (Kravitch, J., dissenting). In conclusion, she summed up the real motivation behind the party's actions:

> The Republican Party of Georgia and the state seek to exclude Duke from the primary ballot because they believe that the party will suffer embarrassment and adverse publicity by virtue of his candidacy for the Republican nomination. No political body, however, has a constitutional right to freedom from embarrassment . . . .

Id. at 1539.

171 In a separate but similar case, Duke successfully challenged Florida's Presidential Candidate Selection Committees under the vagueness doctrine. *See* Duke v. Smith, 13 F.3d 388 (11th Cir. 1994) (striking Florida statute on vagueness grounds because it failed to provide a procedure for reconsideration of candidate requests to be placed on the ballot). However, on remand in *Duke III*, the district court held that the Georgia statute survived this analysis because the vote of three party members constituted a "protective mechanism" sufficient to avoid the vagueness problem. Duke v. Cleland, 884 F. Supp. 511 (N.D. Ga. 1995).

Duke v. Cleland creates some tension with the Supreme Court's recent analysis of its own ballot access jurisprudence. In *U.S. Term Limits v. Thornton*,[172] the Court held that Amendment seventy-three to the Arkansas Constitution, which required multiple-term incumbents to run only as write-in candidates, constituted an impermissible exercise of the state's power to regulate elections.[173] Discussing its ballot access jurisprudence, the Court noted that these cases "did not involve measures that exclude[d] candidates from the ballot without reference to the candidates' support in the electoral process."[174] Yet, the Eleventh Circuit allowed the party acting under state law to achieve precisely this result by excluding a candidate from participating in primary elections—the very means used to determine a candidate's support.[175]

The case is also a strange application of the "party autonomy" concept. It is less than clear how a state procedure enabling state officials to remove party candidates protects that party's autonomy. Rather, such a statute infringes on that autonomy. Notably, when Duke brought a practically identical lawsuit challenging Florida's candidate selection committee in *Duke v Smith*,[176] the Eleventh Circuit strongly implied that the courts could not review a candidate's exclusion if the party removed Duke without the state's involvement. As discussed earlier, a political party must respect the constitutional

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The presence of subjectivity in primary election law has been the subject of considerable conflict in the federal courts. Excluded candidates have challenged the use of media recognition statutes, which allow the Secretary of State complete discretion to determine candidate access to party primaries based on whether the candidate is "generally recognized" as a presidential contender within the party or the media, but require minor parties or other candidates to collect signatures to gain ballot access. These procedures, therefore, give already strong candidates a "free pass" to the ballot. *See, e.g.*, CONN. GEN. STAT. ANN. § 9-465 (West 1989); IDAHO CODE § 34-732(1) (1993); MASS. GEN. LAWS. ANN. ch. 53, § 70E (West 1993). Some challenges to these statutes on void-for-vagueness grounds have been successful. *See* Duke v. Connell, 790 F. Supp. 50 (D.R.I. 1992). But, more often, courts have been unwilling to strike the laws. *See* Kay v. Austin, 621 F.2d 809 (6th Cir. 1980); LaRouche v. Kezer, 787 F. Supp. 298 (D. Conn. 1992), *rev'd in part*, 990 F.2d 36 (2d Cir. 1993); LaRouche v. Sheehan, 591 F. Supp. 917 (D. Md. 1984). *See generally* Matelson, Note, *supra* note 14, at 1250-56 (providing a complete analysis of the case law under vagueness doctrine). Duke based his claim in Georgia on the conflict between his associational rights, the right to vote, and the associational rights of the party. The doctrinal bases of the decisions differ, and the vagueness doctrine is therefore beyond the scope of this Note.

172 115 S. Ct. 1842 (1995).

173 *See id.* at 1868-71.

174 *Id.* at 1870.

175 Under the Georgia and Florida statutes the three party elders would have the same power to eliminate incumbents from consideration, as they had to eliminate Duke. *See Duke*, 954 F.2d at 1539 n.10 (Kravitch, J., dissenting) (noting that the state and party claimed that the Republican Party could have excluded, without explanation, all candidates but George Bush from the Republican Party primary).

176 13 F.3d 388 (11th Cir. 1994).

rights of individuals only in circumstances when it is a state actor.[177] The court found that the committee's action was state action because the statute establishing the committee was a "state-created procedure[ ], not the autonomous political parties, mak[ing] the final determination as to who will appear on the ballot in each primary election."[178] Furthermore, the court found state action because the statute did not leave the parties the discretion to review the candidate's placement on the ballot.[179] This analysis implies that if the party excluded Duke without state involvement, it would not have violated Duke's constitutional rights because a political party in that action is a private organization to which the Bill of Rights does not apply.[180]

In short, the Eleventh Circuit's application of the associational rights case law in *Duke* is problematic. The case nevertheless represents a significant grant of political discretion to the state party leadership to control candidate access to the party and demonstrates the reach of the Supreme Court's party-autonomy jurisprudence. If the party can eliminate David Duke on the basis of his political beliefs, the party can eliminate other candidates on the same grounds. As the Eleventh Circuit recognized, "The Committee may exclude nationally recognized candidates for any reason or no reason at all."[181] Although parties are unlikely to exercise this power because in most circumstances such action would be politically awkward, the decision increases the party's ability to restrict access to the party apparatus by candidates hostile to the party's ideology. In addition, the decision clearly reflects a view that a party's rights are superior to the rights of individuals who wish to join it. In this way, the associational rights doctrine and the right-to-vote doctrine enabled the party to neutralize

177 *See supra* text accompanying notes 44-57.

178 *Smith*, 13 F.3d at 393.

179 *See id.*

180 *Cf.* Federspiel v. Ohio Republican Party State Cent. Comm., 867 F. Supp. 617, 620 (S.D. Ohio 1994) (dismissing case and finding no state action when party members challenged party election), *aff'd*, 85 F.3d 628 (6th Cir. 1996). Because Duke challenged actions taken by a party committee, it was unclear how the party's associational rights were involved if the committee was a state actor. In *Duke II*, the Eleventh Circuit determined that the Committee's decision as a whole constituted state action. Duke v. Cleland, 5 F.3d 1399 (11th Cir. 1993). In *Duke III*, the district court concluded that three party members on the committee simultaneously acted as party representatives, "and therefore also wore a party hat at the time of the decision," Duke v. Cleland, 884 F. Supp. 511, 515 n.2 (N.D. Ga. 1995), and the Eleventh Circuit agreed, Duke v. Massey, 87 F.3d 1226, 1231 (11th Cir. 1996). Thus, the individuals were both state actors, to whom the Bill of Rights applied, and non-state actors, to whom the Bill of Rights did not apply, at the same time.

181 *Duke*, 5 F.3d at 1403.

a significant weakness in the direct primary system[182] and to increase party influence in the nomination process.

2. *Limits on State Control Over the Nomination Process:* Republican Party v. Faulkner County

The expansion of political party associational rights has also strengthened the major parties' ability to challenge state laws regulating their internal affairs, particularly in the nomination process. In *Eu v. San Francisco County Democratic Central Committee*, the Court established that states are limited in their ability to demand specific internal structures for state party organizations.[183] At issue were California statutes that required, for example, that the chair of the state central committee rotate between residents of northern and southern California, specified membership of the parties' governing bodies, and established the dues committee members must pay.[184] In simplified terms, the California state legislature was dictating the details of the party's organizational structure. These statutes burdened the party's associational rights by "limit[ing] the party's discretion in how to organize itself . . . [and associate] with one another in freely choosing their parties' leaders."[185]

To survive strict scrutiny, the Court required California to advance a compelling interest for these regulations. Finding none, the Court distinguished statutes that directly regulate the party's leaders from ballot access statutes, which infringe the associational rights of the parties indirectly to ensure order and fairness in elections.[186] In future cases, states defending statutes that regulate internal party affairs will need affirmatively to show that "such regulation is necessary to ensure an election that is orderly and fair."[187] Because many states heavily regulate the major political parties,[188] these parties can use *Eu* to challenge state laws that weaken the parties as political actors.

In *Republican Party v. Faulkner County*,[189] the Eighth Circuit recently demonstrated this application of the associational rights doctrine by invalidating on constitutional grounds a state law that required the major parties to conduct and fund a primary election.[190] In *Faulkner*, an Arkansas statute required "organized political parties"

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182 *See infra* text accompanying notes 496-99 (discussing party weakness in the direct primary system).

183 489 U.S. 214, 230 (1989).

184 *See id.* at 218-19.

185 *Id.* at 230-31.

186 *See id.* at 231-32.

187 *Id.* at 233.

188 *See* KEEFE, *supra* note 59, at 51-52 (identifying two general bodies of state law: laws regulating nominations and elections and those affecting party cohesion in government).

189 49 F.3d 1289 (8th Cir. 1995).

190 *See id.* at 1294.

to certify that a candidate for the general election received either a majority of votes or ran unopposed at the party primary, and to pay the expenses of organizing and conducting their own primary.[191] First, the court read *Eu* as establishing a general rule: "In essence, the internal affairs of political parties are off-limits to state regulation, unless the state finds it necessary to meet a compelling state interest."[192] Thus, the court felt that even under the flexible *Anderson/Burdick* analysis, strict scrutiny applied.[193] To defend the scheme, the state proffered four interests: (1) protecting the integrity of the nominating process, (2) minimizing voter confusion, (3) preventing frivolous candidacies, and (4) ensuring that the winning candidate will receive a majority of the vote.[194] The problem was that the Republican Party could only afford to pay for a small number of polling places. The party demonstrated that, as a result, voters either could not find a Republican polling place or arrived at Democratic polling places and voted in that election rather than find the correct location.[195] These problems "severely burdened" the right of party members to vote and the Republican Party's ability to reach all persons wishing to vote in their primary.[196] The scheme actually undermined the state's asserted interests: an electoral scheme that caused Republican voters to vote in the Democratic Primary did not minimize voter confusion or protect the integrity of the voting system. In essence, the party's rights were severely burdened by the party's inability to pay for its primary, leaving the state the choice of requiring no primary at all or paying for one.

Faulkner is significant because the Eighth Circuit used associational rights as a substantive limit on the state's ability to dictate a party's nominating procedures.[197] A state can violate a political party's associational rights if the state enacts a primary election system that unduly burdens the party's association with its members. Moreover, the court reached this conclusion by considering the actual impact of the nominating procedure on the party's campaign

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191 *See id.*

192 *Id.* at 1294.

193 *See id.* at 1297.

194 *See id.* at 1299.

195 *See id.* at 1298.

196 *See id.*

197 *Cf.* Lowenstein, *supra* note 43, at 1276-77 (noting that the same logic used to decide *Eu* and Tashjian v. Republican Party, 479 U.S. 214 (1989), could be extended to prohibit states from requiring party primaries, but the Court is very unlikely to support such a finding). For the arguments supporting party autonomy in nominating procedures, see Weisburd, *supra* note 56, at 214 (claiming "statutes requiring parties to use particular nominating methods are of doubtful constitutionality"); *see also* Karl D. Cooper, Note, *Are State-Imposed Political Party Primaries Constitutional?: The Constitutional Ramifications of the 1986 Illinois LaRouche Primary Victories*, 4 J.L. & POL. 343, 373 (1987) (presenting the argument that state-mandated primaries violate parties' associational rights).

activities.[198] Thus, *Faulkner* suggests that courts balancing the burdens imposed by an election scheme must consider evidence demonstrating that a scheme actually interferes with the party's ability to organize and campaign effectively.[199] If the party can produce sufficient evidence, they can object to a state-dictated candidate selection method and the state must have a compelling justification for its electoral scheme. This holding also represents the first step in what remains an important question for political parties: can the state mandate that a party hold a primary rather than a convention if the party can demonstrate that a forced primary interferes with its associational rights?[200]

3. *Increasing Major Party Influence in Candidate Nominations Through Primary Ballot Access Laws:* Rockefeller v. Powers

In addition to the development of associational rights, the Supreme Court's ballot access cases applying right-to-vote doctrine also has enabled the major parties to increase their influence as political actors. First, the Court has consistently approved the states' use of ballot access restrictions to keep minor-party candidates off the ballot, which reduces political competition and simplifies their political environment.[201] Second, in *Burdick v. Takushi*,[202] the Supreme Court determined that the actual choice presented to voters under a state's electoral laws receives little weight when determining the constitutionality of an election statute.[203] Relying on these holdings, major parties

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198 The court stressed the facts found by the district court: the disparity in the number of polling places available to Republican voters, the fact that the number of voters who voted in the Democratic primary exceeded the number in the general election, and the suggestion that the electoral scheme was motivated by a desire to preserve Democratic partisan advantage. *See Faulkner*, 49 F.3d at 1298.

199 A minor party has made this very claim, but was not as successful. In *Green Party v. Jones*, 37 Cal. Rptr. 2d 406 (Cal. Ct. App. 1995), a state court held that the state could ignore a party rule requiring any candidate seeking access to the ballot in the party's primary to also seek approval at a party convention. Such a rule enabled the exclusion of a party nominee if a majority of the party's voting members supported it, thereby ensuring that the party's ballot access could not be used in a manner contrary to party principles and ideologies. *See id.* at 409-411. The court rejected the party's attempt to control its candidate selection procedures, holding that potential injury represented by the possibility of allowing candidates with hostile ideologies did not strongly implicate the party's associational interests. *See id.* at 415. This case seems in considerable conflict with both the Supreme Court's decisions in *Eu* and *Tashjian*, as well as the Eighth Circuit's decision in *Faulkner*, and the Eleventh Circuit's decision in *Cleland*.

200 The Court has never fully addressed the question. *See infra* note 268. However, Justice Scalia has made clear that he does not think that associational rights extend this far, and thus, he would presumably not agree with *Faulkner*. *See Tashjian*, 479 U.S. at 235 (Scalia, J., dissenting).

201 *See infra* Part II.B.

202 504 U.S. 428 (1992).

203 *See infra* text accompanying notes 248-60 (discussing the Court's opinion upholding Hawaii's ban on write-in voting in *Burdick*).

can enact primary ballot access laws to provide significant advantages to candidates favored by the state party organization without infringing on the constitutional rights of excluded party candidates or their supporters.

In *Rockefeller v. Powers*,[204] the Second Circuit upheld a state statute, enacted at the request of the party, that established a system of presidential primary elections in which separate delegates were elected to represent each of the state's thirty-one Congressional districts.[205] In other words, the statute created thirty-one separate presidential primary elections. A separate statute controlled ballot access and required that each candidate gather signatures from the lesser of five percent or 1250 enrolled party voters in each congressional district.[206] Republican voters supporting Steve Forbes sued after he failed to satisfy this requirement in a minority of districts,[207] claiming that the signature requirement violated the Equal Protection Clause because it caused fewer candidates to qualify for the ballot in small districts than in more populous districts.[208] According to the plaintiffs, the 1250 signature cap eased the burden of collecting signatures in heavily Republican suburban and rural districts,[209] but the five percent requirement required a comparatively larger percentage of voters in urban districts where, "'a Petitioner-carrier could wait for a week on Flatbush Avenue and not encounter a single Brooklyn Republican!'"[210] As a result, fewer candidates collected the required signatures in these less populous districts, and voters who lived there had fewer candidates from whom to choose.[211]

The plaintiffs challenged the statute under the First Amendment as well[212] but the district court, in awarding them a preliminary injunction, focused on the equal protection claim.[213] The district court

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204 74 F.3d 1367 (2d Cir. 1996).

205 *See id.* at 1370-71.

206 *See id.*

207 *See id.* at 1373 n.11.

208 *See id.* at 1371-72. In heavily Republican districts, capping the signature requirement at 1250 resulted in candidates actually needing to gather far less than five percent of the registered voters. In the most heavily Republican district, for example, there were 158,097 registered Republicans. A five percent requirement in this district would result in 7905 signatures. When the 1250 signature cap applied, the actual percent required dropped to 0.79%. In less Republican districts, however, the five percent requirement determined the amount of signatures required. *See id.*

209 *See id.*

210 *Id.* at 1372.

211 To prove the impact on voter choice, the plaintiffs documented that in the 1988 primary, although there were four major contenders for the Republican nomination (George Bush, Robert Dole, Jack Kemp, and Pat Robertson), in the eight districts with the fewest Republicans, only Bush appeared on the ballot in four, and only Bush and one other candidate appeared in the other four. *See id.*

212 *See id.* at 1370.

213 *See* Rockefeller v. Powers, 909 F. Supp. 863 (E.D.N.Y. 1995).

analyzed the effect of the signature requirements on voter choice, noting that the only justification for imposing a higher signature burden in less populous districts was "a desire to increase the advantage already enjoyed by the presidential candidate favored by the Party organization."[214] Candidates independent of the party organization were forced to forego petitioning in districts in which it was more difficult to collect signatures.[215] According to the court, without an adequate choice of candidates, the voters' right to vote was "meaningless."[216]

The Second Circuit panel comprised of Judges Jacobs, Calabresi, and Parker reversed, holding that the disparity of signature requirements did not "significantly burden" the voters' "fundamental right to vote" because the statistical evidence the voters presented did not establish an "appreciable correlation between the number of registered Republicans and the incidence of 'no choice' (i.e., one or no candidate) ballots."[217] The Second Circuit claimed that the evidence showed that the number of "no choice" districts, districts in which no candidate or a single candidate gained ballot status, appeared to be randomly distributed throughout the state.[218] Therefore, these voters were not discriminated against on this basis. Although there was a correlation between district size and the presence of more than two candidates—no more than two of the four serious candidates appeared on the ballot in the fifteen least-Republican districts[219]—this disparity did not warrant strict scrutiny because a choice of two candidates was a less serious problem than a system that presented no choice among candidates.[220]

After this defeat, Forbes renewed the motion for a preliminary injunction and urged the district court to consider whether the ballot access laws constituted an undue burden on the right to vote, an issue that the court did not decide in the first decision.[221] The district court again awarded the injunction, holding that the ballot access laws, which required a total of 37,000 signatures across thirty-one electoral districts, constituted an undue burden under *Anderson*.[222] The court based its decision primarily on three arguments. First, the number of signatures required by New York's ballot access laws in the presidential primary was "substantially" higher than the presidential

214 *Id.* at 868.
215 *See id.*
216 *Id.*
217 *Rockefeller*, 74 F.3d at 1379.
218 *See id.*
219 *See id.*
220 *See id.*
221 *See Rockefeller*, 917 F. Supp. at 159.
222 *See id.* at 159-60.

primaries in other states.[223] Second, the fact that the wealthy Forbes could not qualify in all the districts showed that only candidates who are favored by the Republican Party would be able to qualify in every district.[224] Third, because the statutory scheme allowed parties to use a .5% signature requirement if they chose to do so, "New York State has no compelling interest in a more restrictive rule than .5% per congressional district."[225] The court ordered the state to place Forbes on the ballot in the four congressional districts where he had failed to gather sufficient valid signatures to qualify. On appeal, a new panel consisting of Judges Van Graafeiland, Meskill, and Winter perfunctorily affirmed the decision in a two-page opinion that was devoid of any substantive legal analysis.[226]

At first glance this case might appear to be a stinging defeat for the New York Republican Party and to run counter to this Note's thesis. However, a close examination of the opinion reveals that the decision was based more on the particular inequities Forbes suffered at the hands of the state party than a reasoned application of the relevant case law. First, District Court Judge Korman's opinion almost completely ignored the precedent that defines what signature requirements constitute an undue burden on voters' rights under *Anderson*.[227] This case was far from the first challenge to an unreasonable signature requirement; minor parties have challenged these laws for decades. For example, in *Storer v. Brown*, the Supreme Court did not invalidate a California law that required a minor party to collect 325,000 signatures in twenty-four days.[228] Other state laws requiring well over 100,000 signatures have been routinely held as not imposing an undue burden on ballot access.[229] The 37,000 total signatures required in New York—even in light of other stringent technical requirements that New York imposes—are far lower than these minor party requirements. Although ballot access challenges usually involve minor parties seeking access to the general election ballot, the cases are clearly relevant in determining what petition requirements constitute an undue burden in a presidential primary. There is no clear reason why the effort and resources a major-party candidate must expend to gain ballot access in a state-administered primary election

223 *See id.* at 160-62.

224 *See id.* at 163-64.

225 *Id.* at 164.

226 The decision cited only one case and basically consisted of a short summary of the district court's opinion. *See Rockefeller*, 78 F.3d at 44-46.

227 Although the decision quotes from a number of relevant Supreme Court decisions, it fails to compare ballot access laws that were found constitutional in those cases to the New York law except in the most perfunctory way. *See, e.g., Rockefeller*, 917 F. Supp. at 159-65.

228 *See* Storer v. Brown, 415 U.S. 724, 740 (1974).

229 *See, e.g.*, Libertarian Party v. Florida, 710 F.2d 790, 794 (11th Cir. 1983).

cannot be compared persuasively to those which a minor-party or independent candidate must expend. In addition, the Second Circuit had previously upheld a number of technical provisions similar to those that Judge Korman found objectionable in *Rockefeller*.[230] Yet, none of these cases received more than a passing mention. Without any attempt to distinguish these cases, the decision is a questionable one.

Second, Judge Korman inadequately analyzed a central fact in the case: the Republican Party, not the state, made the decision to employ the five percent or 1250 signature requirement to determine which candidates could participate in its primary.[231] That the Party chose this method of qualifying candidates implicates a central associational right—the party's ability to select a "'standard bearer who best represents the party's ideologies and preferences.'"[232] If, in *Duke v. Cleland*, the Republican Party's First Amendment rights protected its exclusion of David Duke from a presidential primary,[233] it seems odd to say that a state party cannot decide to enact difficult ballot access requirements. It's the party's choice. Reconciling the two cases creates an anomalous result: a party committee can exercise its decision to prohibit a candidate from participating in a party primary regardless of her popularity, but it cannot enact a nondiscriminatory rule that applies equally to all candidates and tests her support in the party.

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230 *Compare* Unity Party v. Wallace, 707 F.2d 59, 62 (2d Cir. 1983) (upholding N.Y. ELEC. LAW § 6-146(1)), *with Rockefeller*, 917 F. Supp. at 161 (citing § 6-134(2) as an example of a "cumbersome and arcane" rule). In *Rockefeller*, the district court found it objectionable that Forbes needed to gather 140% of the statutory requirement to survive challenge. 917 F. Supp. at 162. However, in *Schulz v. Williams*, 44 F.3d 48, 57 (2d Cir. 1994), the court upheld New York's requirement that each independent nominating petition indicate the signer's election district, assembly district, or ward even though the candidate needed to gather 30,000 signatures to obtain the 15,000 statutorily required signatures to safely survive challenges. In addition, a number of other cases upholding New York's ballot access laws have been decided. *See, e.g.*, Berger v. Acito, 457 F. Supp. 296 (S.D.N.Y. 1978) (upholding technical petition requirements). *But see* Katherine E. Schuelke, Note, *A Call for Reform of New York State's Ballott Access Laws*, 64 N.Y.U. L. REV. 182 (1989) (arguing that the entire New York ballot access system is unconstitutional).

231 The statutory scheme allowed the major parties to choose how many signatures to require. As the court explained:

> While the Legislature has offered each political party the option of which alternative to choose . . . the choices merely codify each party's preferred method of ballot access for its primary. . . .
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> . . . The rule the Committee chose consistently and decisively advantages the candidate it supports and discourages and disadvantages the candidates it has rejected.

Rockefeller, 917 F. Supp. at 164.

232 Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 224 (1989) (quoting Ripon Society v. National Republican Party, 525 F.2d 567, 601 (D.C. Cir. 1975)).

233 *See supra* text accompanying notes 151-71.

The district court seemed especially disturbed by the influence the state party had in the election because the party used its organizational strength to qualify Dole statewide but denied the same assistance to the other candidates.[234] Yet this fact is not relevant to the constitutionality of the electoral scheme. The Supreme Court has explicitly protected the right of party organizations to campaign actively in primaries for some party candidates at the expense of other party candidates.[235] In *Rockefeller*, the district court and the Second Circuit did not even mention the possible associational rights implications that the case presents.[236]

Because of the shortcomings in the court's analysis, *Rockefeller* is important more for what it shows about ballot access law than about the substance of its holding. Nonetheless, the decision demonstrates that under current doctrine, political parties retain considerable leeway to enact rules that restrict participation in party primaries. Despite the court's final decision, the major political parties are effectively able to influence the outcome of party primaries through the enactment of ballot access law, even though the right to vote may provide some limitation on their ability to do so. The New York Republican Party took advantage of what minor parties have known all along—ballot access laws keep candidates off the ballot. Because the state party collects the signatures for their favored candidates, the state party can force candidates it opposes to spend vital resources to gain ballot access and can eliminate many candidates from competition.[237] This power provides a strong incentive for candidates to be responsive to the party's leadership.[238] Thus, the cases illustrate that the ballot access case law may benefit the major parties by increasing their influence in party nominations.

4. *Summary: The Legal Status of the Major Parties*

The lower courts' application of the associational rights doctrine is strengthening major parties' influence in nominations, insulating

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234 *Rockefeller*, 917 F. Supp. at 163 ("[W]ithout the support of the New York Republican State Committee, only the most atypical of candidates, one with unlimited financial resources, can come even close to replicating the unique ability of the favored candidate to obtain ballot access . . . .").

235 *See Eu*, 489 U.S. at 224 ("Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association.").

236 I do not claim that the case is clear either way. However, it seems to be a serious shortcoming of the courts' analyses that these issues were not considered.

237 Until 1996, two candidates had never appeared on the ballot in all thirty-one congressional districts. Don Van Natta, Jr., *Ruling Puts Forbes on Primary Ballot Across New York*, N.Y. Times, Feb. 29, 1996, at B8.

238 *Cf. supra* text accompanying notes 181-82 (describing how restricting access to primaries increases party influence in the nomination process).

the internal processes of the major parties from state regulation,[239] and protecting the parties from primary systems that interfere with their selection of candidates. The question remains open whether the major parties will seek to take advantage of these legal developments and create more centralized and powerful political organizations—a development that the political science community has heralded as a positive one since 1950.[240] Many political scientists believe that the current system of direct primaries, free from party influence, has degraded the quality of party governance.[241] As *Duke, Faulkner,* and *Rockefeller* demonstrate, the associational rights and right-to-vote case law are potential tools for state party organizations to use to reassert themselves as political actors.

The current Court recently refused an opportunity to delineate more clearly the limits of the associational rights doctrine. In *Morse v. Republican Party,*[242] the Court held that section 5 of the Voting Rights Act (the "Act") requires the preclearance of a delegate registration fee if a political party selects candidates by convention and state law automatically places the candidate on the ballot in the general election.[243] In the seven states that are subject to that section of the Act,[244] any change in candidate primary procedures must be precleared by the Attorney General or the United States District Court for the District of Columbia.[245] Justice Scalia described why associational rights are potentially threatened by this requirement:

> Given that political parties are organized with the near-exclusive purpose of influencing the outcomes of elections, I think it obvious that . . . § 5 requires political parties to submit for prior Government approval, and bear the burden of justifying, virtually every decision of consequence regarding their internal operations. That is the most outrageous tyranny. A freedom of political association

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239 *See* Hietmanis v. Austin, 899 F.2d 521, 529 (6th Cir. 1990) (invalidating state law that required parties to allow incumbent legislators to sit on county executive committee); Louisiana Republican Party v. Foster, 674 So. 2d 225, 234 (La. 1996) (holding that election law that specifies a method for electing party members to state party committee violates freedom of association).

240 In 1950, the American Political Science Association published a highly influential report on the role of political parties in American politics. Committee on Political Parties, American Political Science Ass'n, *Toward a More Responsible Two-Party System,* 44 AM. POL. SCI. REV. 810 app. (1950). These scholars argued that until parties become "centralized, disciplined, and cohesive national parties dedicated to formulating, expounding, and implementing policy programs" they will "never play their proper role" in American Democracy. *See* RANNEY, *supra* note 47, at 42-44 (summarizing the report).

241 *See infra* text accompanying notes 497-99.

242 116 S. Ct. 1186 (1996).

243 *See id.* at 1206.

244 *See id.* at 1193.

245 *See id.*

> that must await the Government's favorable response to a "Mother, may I?" is no freedom of political association at all.[246]

Nonetheless, a divided Court chose to ignore the associational rights issue raised by the case until the issue was directly litigated in a future case.[247] As a result, little can be inferred from the Court's opinion.

E. The State Regulation of Minor Parties: Exacerbating the Double Standard

Supposedly, minor parties operate within the same legal framework as major parties; thus, the expansion of associational rights is equally applicable to them. This Part asserts, however, that in contrast to major-party claims, minor-party claims that state laws impinge on their associational rights and the right to vote resulted in only a few victories of limited political significance under *Anderson*. First, the implications of the Supreme Court's decision in *Burdick v. Takushi* are discussed. Second, minor-party challenges to state statutes regulating party nomination procedures, party affiliation and voter registration procedures, and state control over ballot formulation are analyzed. This Part concludes with a short analysis of the current split in the circuits over the constitutionality of "anti-fusion" laws—state laws that prohibit candidates from accepting the nomination of more than one party.

1. Burdick v. Takushi

In *Burdick*, the Supreme Court upheld the constitutionality of Hawaii's ban on write-in voting.[248] Although the case did not directly involve minor parties, the Court's opinion is significant because it casts light on how the current Court is likely to analyze electoral laws that burden the right to vote. The decision has two main implications. First, the Court rejected any notion that voting restrictions implicate free speech concerns as First Amendment expression. According to the Court, "[a]ttributing to elections a more generalized expressive function would undermine the ability of states to operate

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246 *Id.* at 1218 (Scalia, J., dissenting). The four dissenting Justices all agreed that the First Amendment issues should have been discussed because holding that a party's convention fee must be precleared poses serious constitutional problems. *See id.* at 1220-21 (Kennedy, J., dissenting); *id.* at 1237-38 (Thomas, J., dissenting).

247 Only Justices Stevens and Ginsburg joined in the Court's opinion, but they simply dismissed the Party's associational rights claim without analysis. *See id.* at 1210-11 (noting that such First Amendment concerns were "hypothetical"). Concurring in the judgment, Justices Breyer, O'Connor, and Souter admitted that "First Amendment questions about the extent to which the Federal Government . . . can regulate the workings of a political party convention, are difficult ones [which] are properly left for a case that squarely presents them." *Id.* at 1215 (Breyer, J., concurring).

248 Burdick v. Takushi, 504 U.S. 428, 438-39 (1992)

elections fairly and efficiently."[249] Voting, however, is both an instrumental determinant of political outcomes and a vehicle for communicating expressions of discontent or support for the current political regime.[250] Political scientists have noted that because the actual instrumental impact of a single vote is infinitesimally small—the probability that any single voter can determine the outcome of the election—the benefits of voting result primarily from the expressive aspect of the act.[251] The expressive quality of voting is especially apparent when that vote is cast for a minor-party candidate with the chance of electoral success. Before *Burdick*, the Court recognized that minor parties are worthy subjects of constitutional protection because of the political expression they contribute—and the voters who demonstrate their support of this expression when they vote—to the marketplace of ideas.[252] The *Burdick* decision therefore could be read as a subtle erosion of one of the prime justifications for the protection of minor parties.

Second, whether an electoral system provides voters with adequate choice among candidates is given little weight in deciding if the right to vote is infringed. In *Burdick*, the voter wished to write-in a candidate's name because only one candidate qualified for the ballot in his district.[253] The voter had a choice of voting for a candidate he did not support, or not voting at all. Rejecting his claim, the Court's opinion stressed that the burden the state's overall ballot access system imposed on voters' choices, not the write-in ban itself, determined whether the ban violated the right to vote.[254] If the state's ballot access system was acceptable, the write-in ban imposed only a

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249 *Id.* at 438.

250 *See* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 363-78 (1993) (explaining the expressive nature of the vote).

251 Rational choice theorists have described the act of voting as having very small instrumental henefits. *See* Anthony Downs, An Economic Theory of Democracy 244 (1957).

252 The Court in *Anderson v. Celebrezze* explained:

> [Ballot access] restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.

460 U.S. 780, 794 (1983); *see also* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776, 782 (4th Cir. 1989) ("It is apodictic that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning .... [T]he right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable.").

253 *See Burdick*, 504 U.S. at 442 (Kennedy, J., dissenting).

254 As long as the "State's ballot access laws pass constitutional muster . . . a prohibition on write-in voting will be presumptively valid . . . ." *Id.* at 441. The Court analyzed the Hawaii ballot access system under the ballot access case law and found it constitutionally adequate because of its low siguature requirement for obtaining a place on the primary ballot. *See id.* at 439.

"limited burden" on voters.[255] The question of whether the system presented that particular individual voter with adequate electoral choice did not enter into this analysis.[256] In sum, the right to vote only protects an individual's right to choose among "already nominated, bona fide candidates"[257] and to participate in a state-structured electoral process.[258] As a result, it is questionable whether the right to vote retains much meaningful significance as a limitation on state power to regulate minor parties outside of traditional ballot access cases.[259] The Supreme Court's treatment of voter choice increases the disparity in the legal status of major and minor party candidates by making it difficult for minor parties to argue that an electoral system which presents voters with inadequate choices warrants court intervention. This factor had previously benefitted minor parties and independent candidates.[260]

2. *Minor Parties and State Mandated Party Nomination Procedures*

Like the major parties, the minor parties have attempted to use the courts to increase their autonomy from the state and reduce state intervention into the parties' internal affairs. Unlike their treatment of major parties, states appear to retain considerable discretion to regulate party nomination procedures, regardless of the effect that the nominating procedures have on the political activities of minor parties. In *Lightfoot v. Eu*,[261] the Libertarian Party unsuccessfully challenged a California statute requiring political parties to nominate candidates solely by a state-mandated direct primary.[262] The Republi-

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255 *See id.* at 438-40.

256 In dissent, Justice Kennedy, joined by Justices Blackmun and Stevens, characterized the burden as one on the voter's right to cast a *meaningful* ballot. *See id.* at 445. The dominance of the Democratic Party in the state resulted in many unopposed elections. Because only one candidate appeared on the ballot for the race in question, the voter's choice consisted of voting only for the single candidate on the ballot or not voting at all. The write-in ban deprived the voters of their right to vote for their favored candidate—regardless of whether that candidate was a longshot—and therefore their vote was not meaningful. *See id.* at 442.

257 Karlan, *supra* note 77, at 1712.

258 *See Burdick*, 504 U.S. at 438.

259 *Cf.* Sean R. Sullivan, Note, *A Term Limit by Any Other Name?: The Constitutionality of State-Enacted Ballot Access Restrictions on Incumbent Members of Congress*, 56 U. PITT. L. REV. 845, 872 n.166 (1995) (suggesting that *Burdick* collapsed the right to vote analysis into the associational rights inquiry).

260 *See* Cripps v. Seneca County Bd. of Elections, 629 F. Supp. 1335, 1346-47 (N.D. Ohio 1985) (early filing deadline restricted access to alternative political viewpoints); Libertarian Party v. Beermann, 598 F. Supp. 57, 64 (D. Neb. 1984) (signature requirement heavily burdened right to vote by restricting the elector's choice); McCarthy v. Noel, 420 F. Supp. 799, 803-04 (D.R.I. 1976) (invalidating statute that required independent candidates to complete procedural formalities before major party candidates).

261 964 F.2d 865 (9th Cir. 1992).

262 *See id.* at 869-71.

can Party brought a similar challenge in *Faulkner*—claiming that a state-structured primary interfered with the party's ability to select its candidates. In order to gain greater influence over the nomination process, the Libertarian Party enacted a party rule that allowed the party to nominate a candidate for the general election at a post-primary convention if no candidate ran for a particular office in the state-mandated primary.[263] When the party nominated candidates at the convention, the Secretary of State refused to place the libertarian candidates on the general election ballot despite the fact that the Libertarians had already satisfied California's onerous ballot access requirements.[264]

The Party claimed that mandating a direct primary be the sole method for selecting candidates was an attempt to regulate the internal affairs of the Party, and thus burdened the Party's associational rights.[265] Rejecting this claim, the Ninth Circuit noted that "the [Supreme] Court has recognized that rules governing political parties' internal affairs impose a siguificant burden on those parties . . . [but] has suggested that the states' power to regulate the nominating process is beyond dispute."[266] The court relied on *American Party v. White*,[267] in which the Supreme Court noted that a state may require *either a primary or a convention* but did not in fact decide whether a party must only nominate candidates in a primary.[268] To buttress the weak precedent, the Ninth Circuit reasoned that because party reformers created the direct primary to cripple the power of "party bosses," the state's interest in enhancing "the democratic character of the election process overrides whatever interest the Party has in desiguing its own rules for nominating candidates."[269] This argument is not strong. It is far more democratic to allow a party that has met the

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263 *See id.* at 867 (discussing California Elections Code § 6653). The Party also challenged California Elections Code § 6661(a), which requires the candidate to receive a number of votes in the primary equal to "'1 percent of all votes cast for the office at the last preceding general election at which the office was filled.'" *Id.* at 866 (quoting CAL. ELEC. CODE § 6661(a) (West Supp. 1992)). Because this statute is a classic ballot access provision, it is beyond the scope of this discussion.

264 *See id.* at 866-67.

265 *See id.* at 872.

266 *Id.* at 872.

267 415 U.S. 767 (1974)

268 *See id.* at 781 ("It is too plain for argument . . . that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by *primary election or by party convention.*") (emphasis added). The *Lightfoot* court recognized that no federal court had actually decided the question. *Lightfoot*, 964 F.2d at 872. Such strong reliance on *American Party* seems misplaced. The case was decided in 1974, long before the significant expansion of political parties' association rights in the mid-1980s. In addition, the court cited Scalia's dissent in *Tashjian*—not exactly compelling legal precedent. *See id.* (quoting Tashjian v. Republican Party, 479 U.S. 208, 235 (1986) (Scalia, J., dissenting)).

269 *Lightfoot*, 964 F.2d at 873.

state's ballot qualification requirements to select a candidate at a party convention than to deny the voters an opportunity to vote for any candidate at all. After all, because the party could not fill the vacancy in the election, the party's ballot line would simply be empty.

The Ninth Circuit, despite explicitly applying strict scrutiny,[270] did not consider how the direct primary requirement interfered with the party's associational rights. Instead, the Ninth Circuit relied exclusively on the state's asserted justification: "to take political nominations out of the smoke-filled rooms of party bosses and give them to the voters."[271] In other words, the state sought to protect the party from the influence of its own leadership. This is precisely the type of paternalistic rationale the Supreme Court has rejected in the past. In *Tashjian*, for example, the state of Connecticut argued that Independent voters should not be allowed to vote in the Republican Primary because it would undermine the effectiveness of the party.[272] The Court described such a state interest as "insubstantial,"[273] noting that "'a State . . . may not constitutionally substitute its own judgment for that of the Party.'"[274] Similarly, in *Eu*, the Court found that California could not justify its ban on party endorsements in primaries on the ground that the ban protected the party from "pursuing self destructive acts."[275] The Court has drawn a clear distinction: "a State may enact laws to 'prevent the disruption of the political parties from without' but not . . . laws 'to prevent the parties from taking internal steps affecting the own process for the selection of candidates.'"[276] Although there may be other arguments against the use of party conventions, it seems doubtful whether the state's interest in protecting the party from itself is sufficient to uphold the law under strict scrutiny.

Perhaps the party could have shown, as the Republican Party did in *Faulkner*, that a direct primary allowed voters from other parties to participate in its primary and increased the probability that a candidate whose views conflicted with the party could win the election.[277] Furthermore, as Professor Lowenstein has recognized:

> [T]he conventional constitutional analysis that led the Court to strike down the requirement for a closed primary in *Tashjian* and

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270 *See id.* at 868-69

271 *Id.* at 872.

272 *Tashjian*, 479 U.S. at 222-24.

273 *See id.* at 225.

274 *Id.* at 224 (quoting Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 123-24 (1981)).

275 Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 227 (1989).

276 *Id.* (quoting *Tashjian*, 479 U.S. at 224).

277 *Cf.* Republican Party v. Faulkner County, 49 F.3d 1289, 1301 (8th Cir. 1995) ("Arkansas has likely increased, not decreased, the risk that a . . . fraudulent candidate could win that party's nomination.").

> the statutory governance procedures in *Eu* could be extended with equal logic to the conclusion that the state may not require an unwilling party to conduct a primary at all.[278]

In addition, the Supreme Court has recognized the right of parties to elect candidates that best represent their ideology.[279] The regulation of nominating procedures implicates this right.[280] At the very least, the associational rights at stake were more complex than they appeared to the Ninth Circuit. Notably, the Ninth Circuit did not complete the analysis required by *Anderson* and its progeny. To survive strict scrutiny, the Court has required the statute be the least restrictive means of advancing the asserted state interest.[281] As the Supreme Court noted in *Eu v. San Francisco County Democratic Central Committee*,[282] "a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair."[283] The Court did not explain why a statute that only allowed parties to select candidates in a direct primary was the least restrictive means necessary to ensure a fair election.

The Libertarian Party wanted the autonomy to select, through its own internal and democratic processes, which candidates would appear on their party-line in the general election. In *Duke v. Cleland*, the Eleventh Circuit granted analogous powers to the Republican Party by enabling a candidate committee to completely control which candidates appeared on the primary ballot,[284] and in *Faulkner* the Eighth Circuit limited the power of the state to dictate nominating procedures that interfered with party associational rights.[285] *Lightfoot* stands in considerable tension with these cases. Perhaps the disparity in treatment is due to the fact that a minor party brought the claim and this status somehow strengthened the state's interest in regulating the party. But the type of burden on the party—the ability to select their candidates—was the same in the three cases. Nonetheless, the case supports the proposition that major and minor parties are not ac-

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278 Lowenstein, *supra* note 43, at 1768. Professor Lowenstein strongly qualified this observation by noting that the Supreme Court is very unlikely to extend associational rights this far because this application of the constitutional principle would be outside its proper range. *Id.* at 1768 n.102.

279 *See Eu*, 489 U.S. at 229.

280 *See id.* at 230.

281 *See, e.g.*, Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 185 (1979) (noting that "signature requirements for independent candidates and political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the state's objectives"); *see also* Norman v. Reed, 502 U.S. 279, 294 (1992) (noting that the state did not choose the "most narrowly tailored means" of advancing its interest); McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1221 (4th Cir. 1995) (same).

282 489 U.S. 228 (1989).

283 *Id.* at 233.

284 *See supra* Parr I.D.1.

285 *See supra* Part I.D.2.

corded the same protection from state intrusions into their internal affairs.

3. *State Manipulation of Party Identification and Voter Registration*

A number of states assist the major parties' organizational efforts by funding and administering voter registration drives that register voters according to party affiliation.[286] States utilize voter enrollment lists to administer primary elections and generally regulate the political process.[287] When an individual registers to vote, the state provides the voter with the opportunity to indicate a party affiliation.[288] The state then compiles these voter registration lists and undertakes the time-consuming task of identifying individuals who are sympathetic to a party's ideology.[289] Although states have legitimate interests in requiring voter registration, once the state decides to compile the list and to provide the list free-of-charge to the major parties,[290] the state moves from being a regulator of the political process to a facilitator of party growth. A number of states, however, refuse to allow individuals to designate an affiliation with a party that has not achieved a certain level of statewide recognition.[291] In these circumstances, the legislators provide party-building services at state expense for the major parties, but deny these services to minor parties. In the last decade, minor parties have brought a number of associational rights challenges to these laws, but have had relatively little success.

The initial foray into this area of law looked hopeful for minor parties. In *Baer v. Meyer*,[292] the Tenth Circuit invalidated a law that prohibited voters from affiliating with the Libertarian Party unless the party had achieved statewide recognition.[293] The court held that the statute was invalid under *Anderson* because it imposed an "unequal and unnecessary burden" on the unrecognized party's associational rights and deprived the minor party of access to vital information.[294]

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286 STEPHEN E. FRANTZICH, POLITICAL PARTIES IN THE TECHNOLOGICAL AGE 139-41 (1989).

287 *See, e.g.*, NEW YORK ELEC. LAW § 5-604 (McKinney 1995). Currently, voter registration and party enrollment are required by about half the states and are often used as party-building tools. *See* FRANTZICH, *supra* note 286, at 139-40; REICHLEY, *supra* note 6, at 424.

288 *See* FRANTZICH, supra note 286, at 140.

289 *See id.* at 66-68 (noting that the Republican Party, for example, has compiled a list of 1.7 million individuals from whom they solicit funds).

290 *See, e.g.*, McLaughlin v. North Carolina Board of Elections, 65 F.3d 1215 (4th Cir. 1995).

291 *See, e.g.*, IOWA CODE § 48.6 (1992); OKLA. STAT. tit. 26, §§ 1-110, 4-112 (1989).

292 728 F.2d 471 (10th Cir. 1984) (per curiam).

293 The party needed to win ten percent of the vote in the last election for governor. *See id.* at 472.

294 The court reasoned that access to information about political party affiliation is vital to effective organization and campaigning. By forcing party adherents to register as "unaffiliated," the parties were unable to use the system for this purpose. *See id.* at 475.

Because the state registration system was computerized, allowing voters to register with their party by noting their party affiliation with a single letter on the state's enrollment form constituted a "nominal effort" by the state.[295] Although the state raised the specter of attempting to sort out frivolous affiliations, the court held that the states must permit party designation only if "a political organization already exists in the State, has recognized officials, and has previously placed a candidate on the ballot by petition."[296]

Since the Libertarians' early success in Colorado, courts have consistently retreated from the *Baer* decision. First, the Tenth Circuit largely reversed itself when the Libertarian and Populist Parties sought to invalidate a similar law in *Rainbow Coalition v. Oklahoma State Election Board.*[297] The court distinguished the Oklahoma system from the Colorado system on the grounds that Oklahoma's voter registration system was not computerized. Thus, the increased administrative burdens caused by adding parties tipped the balance of interests in favor of the state.[298] Similarly, in *Iowa Socialist Party v. Nelson,*[299] the Sixth Circuit followed *Rainbow Coalition* to uphold a similar statute in Iowa. Iowa required the signatures of two percent of the vote to be recognized. Because the Oklahoma statute in *Rainbow* allowed registration for political parties that collected the signatures of five percent of the state's voters but the Colorado statute in *Baer* required ten percent of the vote, the court reasoned that the Iowa statute was more similar to Oklahoma's and therefore *Rainbow Coalition* controlled.[300]

Later, in *McLaughlin v. North Carolina Board of Elections,*[301] the Fourth Circuit approved an even more unequal voter registration system. Under North Carolina's system, if a political party gathers signatures equal to two percent of the votes cast in the most recent general election, the party gains access to the North Carolina ballot and can register voters, but the party must obtain ten percent of the vote in the next election to maintain this status.[302] If the minor party fails to receive the requisite ten percent of the vote, it legally ceases to exist and the state changes all the party member registrations to "unaffiliated." To gain ballot access for the next election, the party must again submit the required signatures to become certified and then "reaffiliate"

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295 *See id.*

296 *Id.*

297 844 F.2d 740 (10th Cir. 1988).

298 *See id.* at 747.

299 909 F.2d 1175 (8th Cir. 1990).

300 *See id.* at 1180. The court failed to note, however, that *Rainbow* relied on the lack of a computerized state voter registration system in Oklahoma, which imposed additional administrative burdens on the state, and did not distinguish the statutes on the basis of their party-recognition requirements. *See Rainbow Coalition,* 844 F.2d at 747.

301 65 F.3d 1215 (4th Cir. 1995).

302 *See id.* at 1218-19.

the voters the state eliminated from the voter lists.[303] In contrast, the state requires each county board of elections to provide both the state and individual Democrat and Republican county chairmen (100 in all) "the name, address, gender, date of birth, race, political affiliation, voting history, and precinct of each registered voter" for free.[304]

The court found that forcing the party to reregister its members for each election did not constitute a significant burden under *Anderson*.[305] The court reasoned that because the minor party could purchase the list for a fee before the affiliations were stricken, the party's claim that it could not benefit from the state's voter registration efforts was "without merit."[306] The Fourth Circuit analyzed the burdens imposed by the statute without considering the state's interest in providing lists for free to major parties but not to minor parties.[307] The statute served the state's interest in administrative simplicity, however, because if all political parties have a right to affiliate voters, such a list could possibly become "sizable" and "cause confusion" for registrars trying to keep track of parties with similar names.[308] This contingent interest was deemed sufficient to outweigh the burden imposed on the party.[309]

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303 N.C. GEN. STAT. § 163-97 (1994). The party may obtain the lists before the voter registration names are erased, but they must pay a fee. *McLaughlin*, 65 F.3d at 1228.

304 N.C. GEN. STAT. § 163-97(c) (1994).

305 *Compare* Baer v. Meyer, 728 F.2d 471, 475 (10th Cir. 1984) ("The difficulty is that under current practice . . . [the voter registration scheme has] prevented persons other than those affiliated with the two major political parties from obtaining and using such information in a manner similar to that of the major parties.") *with McLaughlin*, 65 F.3d at 1228 (characterizing the burden imposed by requiring the parties to reaffliliate voters as cognizable, but small).

306 *McLaughlin*, 65 F.3d at 1228.

307 *See id.* The Fourth Circuit's failure to consider this issue created a conflict with the Second Circuit. In *Schulz v. Williams*, 44 F.3d 48, 60 (2d Cir. 1994), the Second Circuit invalidated a statute that required local election boards to provide copies of voter registration lists to ballot-qualified parties, but not to "independent bodies" (which includes minor parties that are not ballot qualified) on the grounds that it violated the Equal Protection Clause. *See id.* at 60. Striking the law, the Second Circuit approvingly quoted the original district court opinion: "The State has shown no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need therefore . . . ." *Id.* (citing Socialist Workers Party v. Rockefeller, 314 F. Supp. 984, 995 (S.D.N.Y. 1970), *aff'd mem.*, 400 U.S. 806 (1970)).

308 *McLaughlin*, 65 F.3d at 1228 (quoting McLaugblin v. North Carolina Bd. of Elections, 850 F. Supp. 373, 386 (M.D.N.C. 1994)).

309 A closer examination of the administrative burden justification reveals that it is a weak one. Under the current scheme, the Libertarian Party, for example, has achieved ballot status in North Carolina in most of the recent elections (1976, 1980, 1984, and 1992). *See id.* at 1219-20. After each election, however, the statute requires the state to identify and remove all the party's affiliated voters from lists containing over three million voters. *See* MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1992, at 916 (1992) (noting that in 1990 North Carolina had 3,347,635 registered voters). In the next election cycle, the party submits the signatures and reaffiliates its old members, requiring the state to switch the voter's affiliations back to Libertarian, and in each election cycle this process repeats. *See id.* Thus, a serious third-party that consistently qualifies for

Under *Anderson/Burdick*, even if the burden is not severe, the distinction between major and minor parties must nonetheless be reasonable and non-discriminatory.[310] When the state has actively immersed itself in the party-building process, perhaps there should be some interest in addition to mere administrative convenience to justify the disparate treatment.[311] These cases demonstrate that associational rights of minor parties do not significantly limit the ability of states to treat minor and major parties unequally.

4. *Minor Parties and Equal Treatment in Ballot Formulation*

The voting franchise is exercised through a ballot created by state election officials. If a state can create a ballot that makes it difficult to find minor party candidates who have qualified for the ballot, the state distorts the outcome of the election by confusing voters. Minor parties can invoke the right to a meaningful or effective vote to challenge state-created distinctions based on minor party status after the candidate has qualified for the ballot. However, that doctrine only protects the interests of minor parties when the state clearly behaves unreasonably.

The clearest example of bias against minor parties in ballot formulation, the states' allocation of ballot location based on a parties' past electoral success, is relatively well established.[312] This practice en-

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the ballot imposes a considerable burden on the voter registration system. By comparison, the state could simply maintain the lists, and allow voter registration until the deadline for filing ballot access signatures for the next election. If the party failed to achieve ballot status, then the voter affiliations could be changed. Such an arrangement avoids the administrative difficulties created when parties consistently qualify for the ballot. In addition, the state's concern over a multiplicity of small parties is misplaced because only parties large enough to obtain the required signatures (51,904) are eligible for voter registration. *See id.* at 1223. Therefore, the correct conclusion is that the state's scheme greatly increases, rather than decreases, administrative complexity, and does not justify the burdens imposed by the system.

To illustrate the inequality of the burdens at stake, it is useful to consider the Sixth Circuit's decision in *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), in which the state of Ohio refused to allow an independent candidate to place a designation on the ballot indicating his nonaffiliated status. State law, however, allowed the major parties to designate party affiliation on the ballot. The Sixth Circuit held that, when a state manipulates identification of party affiliation on a ballot to the advantage of the major parties, associational and voting rights are burdened. *See id.* at 169. A voter registration form, like an election ballot, is a "[s]tate-devised form through which candidates and voters are required to express themselves" at a crucial moment of choice in the electoral process. *Id.* at 175. Although a state clearly may decide to leave party enrollment procedures to the parties themselves, once a state decides to "manipulate the content" of the voter registration forms, like the ballot itself, it must treat the parties equally.

310 Burdick v. Takushi, 504 U.S. 428, 433 (1992).

311 *Cf.* Tashjian v. Republican Party, 479 U.S. 208, 218 (1986) (holding that a state cannot restrain party's "freedom of association for reasons of its own administrative convenience").

312 For example, courts have found ballot formulation schemes constitutional that automatically place independent candidates and minor parties in a worse ballot position than

sures that the major parties are the first two parties listed on the ballot, which makes it slightly less likely that voters will find the minor party line.[313] All is not lost for minor parties, however. In *Rosen v. Brown*,[314] the Sixth Circuit held that an Ohio statute that prohibited a candidate from designating his "Independent" status after his name on the ballot, but allowed the major party designations to appear, infringed the rights of voters to meaningfully vote and associate.[315] The candidate produced expert testimony showing that the law resulted from the domination of the ballot access system by the major parties and that voters' use of party designation as a "voting cue" was the "most significant determinant of voting behavior."[316] Without this label, voters did not know what the candidate represented, and the label's absence created "mistrust and negative inferences" regarding the candidate at the crucial moment when voters made their choice.[317]

Characterizing the law as "nothing more than a deliberate attempt by the State to protect and guarantee the success of the Democratic and Republican parties,"[318] the court held that "[o]nce a State admits a particular subject to the ballot," the state must respect the constitutional rights of other political actors.[319] A law that provides a voting cue for Democrats and Republicans, but denies the same cue to other candidates, severely damages those other candidates' electoral chances.[320] Although the state asserted an interest in minimizing voter confusion and protecting the integrity of political parties, this latter interest "may not extend to the effective exclusion of Independent and new party candidates."[321] In fact, voter confusion arguably

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the major parties, *see* Libertarian Party v. Buckley, 937 F. Supp. 687 (D. Colo. 1996); Krasnoff v. Hardy, 436 F. Supp. 304 (E.D. La. 1977), or utilize the performance of the parties in the last election to determine ballot placement, Ulland v. Growe, 262 N.W.2d 412 (Minn. 1978). Only two states, Delaware and Oklahoma, mandate that the Democrats and Republicans appear first on the ballot, but all states except four (Alabama, Idaho, Mississippi, Virginia) ensure this order results either by using party strength to determine the order or by allowing a state election official to determine the order. *See* Katz & Kolodny, *supra* note 2, at 30. It is possible that states cannot mandate that one party always appear first however, *see* Graves v. McEldery, 946 F. Supp. 1569, 1581-82 (W.D. Okla. 1996), or provide such an advantage to the incumbent, *see* McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980).

313 "Research has shown that placement at the top of a ballot often confers an advantage to candidates so positioned." Morse v. Republican Party, 116 S. Ct. 1186, 1195 n.13 (1996); *see also Buckley*, 937 F. Supp. at 692.

314 970 F.2d 169 (6th Cir. 1992).

315 Associational rights are implicated as well by interfering with the desired association for political gain. *See id.* at 176. However, the injury suffered is more clearly conceptualized as an impediment to the act of casting a ballot for a desired and qualified candidate.

316 *Id.* at 172.

317 *Id.* at 172-73.

318 *Id.* at 176.

319 *Id.* at 175.

320 *See id.* at 175.

321 *Id.* at 177.

increased because the statute withheld relevant information regarding the candidates' lack of affiliation.

The *Rosen* court distinguished the Fifth Circuit holding in *Dart v. Brown*,[322] which permitted the state to print the party affiliation of "recognized parties" on the ballot, but left the notation blank for ballot-qualified candidates affiliated with "unrecognized" political parties.[323] If an unrecognized[324] political party candidate gained ballot placement by petition, the state refused to allow the candidate's designation to appear on the ballot.[325]

Although the statute involved was analogous to *Rosen*,[326] the court in *Dart* determined that the Libertarian Party candidate who qualified for ballot, but was denied a party designation, suffered only a "minor, indirect and remote" burden because the party's supporters had a "full opportunity" to vote for their chosen candidate.[327] The law was simply a permissible distinction based on the success of political parties in prior elections.

The *Dart* court, however, made an important qualification of its holding. If the absence of party affiliation diminished a candidate's chances of electoral success, then the statute "*might* arguably . . . impair the ability to cast a *meaningful* vote."[328] The plaintiff in *Dart* had failed to produce any evidence demonstrating this effect,[329] while the plaintiff in *Rosen* had submitted studies and expert testimony that demonstrated the negative impact of the statute.[330] Therefore, the *Dart* decision is best understood as a failure of evidence. As a result, a state cannot formulate a ballot that interferes with the ability of minor party supporters to cast their ballots for the ballot-qualified party of their choice.[331] However, the minor party will have to provide a con-

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322 717 F.2d 1491 (5th Cir. 1983).

323 *See id.* at 1493-94.

324 The Louisiana state election code recognized a political party if the party's presidential candidate received five percent of the vote in the previous presidential election or if five percent of the registered voters in the state were affiliated with the party. Individual candidates could qualify for the ballot even if their party did not. *See id.* at 1495.

325 *See id.* at 1498.

326 *Compare* Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992) (statute prohibited qualified independent candidates from placing designation on ballot), *with Dart*, 717 F.2d at 1495 (statute prohibiting minor party candidates from unqualified parties who qualify individually by petition from placing party affiliation on the ballot).

327 *Dart*, 717 F.2d at 1504.

328 *Id.* at 1504-05.

329 *See id.* at 1505.

330 *See Rosen*, 973 F.2d at 172-73.

331 *See* Devine v. Rhode Island, 827 F. Supp. 852, 862 (D.R.I. 1993) (state cannot construct ballot that creates the confusing visual appearance that implies an association between a candidate and a party with which he is not affiliated); New Alliance Party v. North Carolina State Bd. of Elections, 697 F. Supp. 904 (E.D.N.C. 1988) (states cannot prohibit placement of minor parties' local candidates on ballot while allowing state and national candidates to appear); Bachrach v. Secretary of the Commonwealth, 415 N.E.2d 832 (Mass.

siderable quantum of evidence that the ballot actually interfered with voters ability to vote for the candidates.[332]

In short, the formulation of the state ballot can infringe upon the rights of minor political parties. States cannot unreasonably withhold information or actively confuse voters. However, because the states are free to use past performance to determine ballot placement, these limitations on state discretion are not overly significant. In addition, ballot formulation, while it might have some effect, is not central to the minor parties' efforts to maintain and expand their political activities. The ballot access laws, by comparison, present a far more urgent threat. Thus, this legal protection is not politically significant.

5. *Fusion Statutes and the Associational Rights of Minor Parties: A Split in the Circuits*

The expansion of associational rights has created one issue of potentially serious importance for minor parties: the constitutionality of fusion laws. Anti-fusion statutes are state laws that forbid candidates from receiving the nomination of more than one political party in the same election.[333] Minor parties employ fusion as an electoral strategy to support major party candidates with whom they agree on policy issues. In New York, for example, the Liberal, Conservative, and Right-to-Life parties utilize strategic nominations effectively to advance their interests and survive as minor parties.[334] In 1993, the number of votes Rudolph Giuliani, the Republican candidate for New York City Mayor, received on the Liberal Party line provided him the margin of victory in the election.[335] Fusion thus enables the minor parties in New York to influence elections and the resulting exposure

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1981) (statute requiring independent candidates to be designated as unenrolled violated the First Amendment and the Equal Protection Clause). *But see* Socialist Workers Party v. Eu, 591 F.2d 1252 (9th Cir. 1978) (upholding state statute requiring independent designation for all candidates qualifying by petition).

332 The evidentiary showing required to invalidate an unfair ballot formulation is unclear, but it is clearly substantial. States still retain considerable discretion to determine how to structure the contents of ballots. In *Devine*, 827 F. Supp. at 854, the state violated the constitutional rights of a minor political party by placing its candidates, albeit with their own party designations, in a column labeled with bold type "Independents for LaRouche." Without requiring any specific evidence, the court declared that "the inescapable visual effect was a direct association between the plaintiff . . . and 'INDEPENDENTS FOR LaROUCHE.'" *Id.* at 856. Such blatant discrimination is the exception, however. Generally, minor parties must produce specific evidence illustrating that the ballot actually interfered with the ability of voters to cast a vote by misleading them. *See* New Alliance Party v. New York State Bd. of Elections, 861 F. Supp. 287, 295 (S.D.N.Y. 1994).

333 For the history of fusion statutes and the associational right argnments for declaring statutes forbidding fusion unconstitutional, see Kirschner, Note, *supra* note 17, at 683; *see also* Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 HARV. L. REV. 1302 (1996) (presenting arguments based on the ballot access caselaw).

334 *See* Kirschner, *supra* note 17, at 684.

335 *See id.* at 683.

helps them to develop party organizations.[336] The Circuits are split on the constitutionality of fusion laws.[337] Central to the disparity in the courts' decisions is their characterization of how anti-fusion laws burden minor party associational rights.

In *Swamp v. Kennedy*,[338] the state of Wisconsin relied on an anti-fusion statute to prohibit the Labor-Farm Party from attempting to place the Democratic candidate for Secretary of State, Douglass La Follette, on the party's primary ballot. The party claimed the prohibition burdened their associational rights in two ways: (1) under *Eu*, the ban infringed the party's autonomy by restricting its ability to select candidates; and (2) the prohibition had a "disproportionate impact on the electoral success of third parties."[339] Two members of a three-member panel of the Seventh Circuit rejected the minor party's claims. The majority concluded that the party's autonomy was not burdened because the party was only "prevented from placing on their primary ballot the name of a candidate who has previously been [nominated]," otherwise the "party may nominate any candidate that the party can convince to be its candidate."[340] In addition, the impact on minor parties was justified because "allowing minority parties to leech onto larger parties for support decreases real competition; forcing parties to [choose] their own candidates promotes competition."[341] That court further argued that the state's compelling interest in "avoiding voter confusion," "preserving the integrity of its election process," and "limit[ing] involuntary fusion of political parties" justified the restriction.[342]

Although the plaintiff's petition for a rehearing en banc was denied, Judge Ripple, joined by Judges Easterbrook and Posner, voted to grant the rehearing and sharply criticized the panel's decision.[343] Judge Ripple characterized the ban as a "broad and severe regulation" that implicated the "right of a party to nominate a candidate of its

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336 Currently, about ten states permit the practice, while it is prohibited in the remainder of the states and the District of Columbia. *See id.* at 685 nn.13-14.

337 *See* Patriot Party v. Allegheny County Dep't of Elections, 95 F.3d 253 (3d Cir. 1996) (invalidating anti-fusion statute); Twin Cities Area New Party v. McKenna, 73 F.3d 196 (8th Cir.) (same), *cert. granted*, 116 S. Ct. 1846 (1996). *But see* Swamp v. Kennedy, 950 F.2d 383 (7th Cir. 1991) (upholding anti-fusion statute).

338 950 F.2d 383 (7th Cir. 1992).

339 *Id.* at 385.

340 *Id.* (emphasis omitted).

341 *Id.*

342 *Id.* at 386. Judge Fairchild interpreted the third state interest to be akin to "maintaining a stable political system." *Id.* at 387. A strong argument can be made that fusion actually works, in practice, against all the state's asserted interests. *See* Kirschner, Note, *supra* note 17, at 703-17.

343 *Swamp*, 950 F.2d at 388-89 (Ripple, J., dissenting from denial of rehearing).

choice," and argued that fusion "sends an important message to the candidate."[344]

In *Twin Cities Area New Party v. McKenna*,[345] a local minor party nominated Andy Dawkins, a state representative from the Democratic-Farm-Labor Party (DFL),[346] as its candidate for state representative. Although, the New Party gathered the required number of signatures to place Dawkins on the ballot, the Secretary of State rejected the nominating petitions because they violated a combination of statutes that had the practical effect of eliminating multi-party nomination.[347] The Eighth Circuit invoked the core associational rights of parties: the right "to select a standard bearer who best represents the party" and to select their own candidate.[348] The denial of a party's opportunity to select the candidate of its choice constituted a severe burden under *Anderson*[349] because historical evidence illustrated that "minor political parties have played a significant role in the electoral system where multiple party nomination is legal, but have no meaningful influence where multiple party nomination is banned."[350] In addition, fusion laws interfered with the ability of minor parties to develop consensual political alliances, thus weakening support for party activities.[351] The court did not determine whether the state's interests were compelling, but rather analyzed whether the law was narrowly tailored. Minnesota's asserted interest in preventing factionalism in the major parties was rejected, however, because the state remained free to require the major party to consent to the minor party nomination.[352] In addition, contrary to the state's claims, voter confusion caused by a name appearing on more than one line seemed especially unlikely because the minor party nominations would actually inform the voters of the candidates' policy stands,[353] and ballot instructions could clarify any confusion that the multiple appearance might

344 *Id.* at 388-89.

345 73 F.3d 196 (8th Cir.), *cert. granted*, 116 S. Ct. 1846, *stay denied*, 116 S. Ct. 2542 (1996).

346 The Democratic-Farm-Labor Party (DFL) is the name of the Minnesota state Democratic Party. It is one of two major parties in the state. *See* BARONE & UJIFUSA, *supra* note 309, at 653.

347 The statutes required candidates to provide an affidavit stating that the candidate had no other affidavit on file for the next election, and prohibited a candidate nominated by primary also to be nominated by petition. *See Twin Cities*, 73 F.3d at 197.

348 *Id.* at 198 (internal quotation omitted).

349 Anderson v. Celebreeze, 460 U.S. 780, 792-95 (1983).

350 *Twin Cities*, 73 F.3d at 199.

351 *See id.*

352 *See id.*

353 *See id.* at 199-200. The Supreme Court has noted that a state's claim that it is minimizing voter confusion by restricting the flow of information "must be viewed with some skepticism." Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 228 (1989).

cause.[354] As a result, the law was not narrowly tailored. Finally, in *Patriot Party v. Allegheny County Department of Elections*,[355] the Third Circuit invalidated a statutory scheme that allowed the Democrats and Republicans to cross-nominate candidates, but did not allow minor political parties to cross-nominate.[356] Again, the court relied on the party's core associational rights—to choose their own candidates and form political alliances—to strike down the law.[357]

The Supreme Court has granted certiorari in *Twin Cities*.[358] The Court's decision may clarify the limits of the associational rights doctrine. Under the associational rights doctrine, the case for fusion is strong because historical evidence demonstrates that fusion enables minor parties to become effective political organizations.[359] If the actual effect of a state law on minor parties' political activities is considered under the *Anderson* balancing test,[360] and minor parties cannot survive without fusion, it is difficult to understand what state law could be more "burdensome." At the same time, a prime justification for fusion arguably runs counter to the Court's right-to-vote doctrine as expressed in *Burdick*. The Third and Eighth Circuits both argued that votes cast for major party candidates on minor party ballot lines send candidates an important message—that they support the minor party's political views.[361] Yet the *Burdick* Court rejected the claim that voting is for expressing opinions.[362] Thus, the court will most likely

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354 *See Twin Cities*, 73 F.3d at 199.

355 95 F.3d 253 (3d Cir. 1996).

356 *See id.* at 270. *Allegheny County* was, in one way, an easier case because the state facially discriminated against minor parties. In the court's analysis, this disparity in treatment increased the burden under *Anderson*, *see id.* at 262, and led the court to analyze the statute under the Equal Protection Clause, *see id.* at 268-70. Although the equal protection argument was similar to the First Amendment balancing analysis, the court focused on whether the law imposed "unequal burdens" without a "countervailing state interest." *Id.* at 270.

357 *See id.* at 262.

358 116 S. Ct. 1846 (1996).

359 *See Twin Cities*, 73 F.3d at 199; *see also* Kirschner, Note, *supra* note 17, at 701-03.

360 The Supreme Court has noted that historical evidence of the impact of electoral regulations is relevant to the constitutional argument. However, the Court has, at times, given this evidence minimal weight in the analysis. *Compare* Munro v. Socialist Workers Party, 479 U.S. 189, 196-97 (1986) (noting that although historical facts are relevant, the fact that a blanket primary system excluded almost every minor party candidate proved "very little" in that case), *with id.* at 200 (Marshall, J., dissenting) ("[T]he Court holds today that the associational rights of minor parties . . . are not unduly burdened by a ballot access statute that, in practice, completely excludes minor parties from participating in statewide general elections.").

361 *See Allegheny County*, 95 F.3d at 261; *Twin Cities*, 73 F.3d at 199; *see also Swamp*, 950 F.2d at 389 (Ripple, J., dissenting) (noting that fusion may yield valuable information for the electorate).

362 The Court stated:

> [T]he function of the election process is "to winnow out and finally reject all but the chosen candidates," not to provide a means of giving vent to "short-range political goals, pique, or personal quarrel[s]." Attributing to

be forced to articulate how fusion does or does not affect minor parties' associational rights, without relying on the expressive benefits of fusion. If fusion is constitutionally required, it is ironic that one of the main beneficiaries will be *major* party candidates, who can now seek votes they otherwise might not have gotten by pursuing minor party nominations.

6. *Summary*

Overall, the expansion of associational rights for political parties following *Anderson* has not been very helpful for minor parties. The associational rights cases have neither lessened state control over minor parties' nomination process, nor lessened the disparate treatment that minor parties receive in the voter registration process. Similarly, states retain the discretion to formulate ballots in ways that discriminate against minor parties, except when that ballot formulation clearly interferes with voting rights. Moreover, the *Burdick* Court's recent treatment of the right to vote signals an erosion of the Court's willingness to protect the voting interests of minor party supporters. Nevertheless, if the expansion of associational rights results in the invalidation of state anti-fusion laws, minor parties will have won a significant victory.

II
JUDICIAL REVIEW OF STATE BALLOT ACCESS RESTRICTIONS

A. Ballot Access: The End of Court Ordered Ballot Access Deregnlation

Minor political parties want to put candidates on the ballot. It is the paradigmatic case of power politics when the two major parties craft pure ballot access laws that create unduly restrictive requirements for third parties.[363] Signature requirements and loyalty oaths, for example, appeared after the early successes of the Socialist Party in the 1930s, and again following Harry Wallace and the Progressive

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> elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.

Burdick v. Takushi, 504 U.S. 428, 438 (1992) (citations omitted); *see also* Note, *supra* note 333, at 1319-21 (arguing that due to *Burdick*, "[a] constitutional right to fusion must be grounded elsewhere than in the claim that [voting] sends a political message"); David Perney, Note, *The Dimensions of the Right to Vote: The Write-In Vote, Donald Duck, and Voting Booth Speech Written-Off*, 58 MO. L. REV. 945, 965 (1993) (arguing that after *Burdick*, "The act of voting is only to determine an office holder, not to contribute to the marketplace of ideas.").

363 *See* Katz & Kolodny, *supra* note 2, at 30 ("[T]he states have attempted to institutionalize not just a two party system, but a system dominated precisely by the Democratic and Republican Parties.").

Party in 1948.[364] In 1930, signature requirements were actually quite low; only four states required new parties to gather more than 10,000 signatures to gain access to the ballot for the United States Senate.[365] After this period, however, states began drastically increasing the ballot access requirements.[366]

Pure ballot access cases involve procedures a candidate must follow to qualify for the ballot without receiving a major party nomination.[367] A majority of the Supreme Court has never recognized candidacy as a fundamental right, and, thus, it is insufficient to invoke "strict scrutiny" of ballot access restrictions.[368] The *Anderson* Court established that courts decide constitutional challenges to ballot access requirements by weighing the burden imposed by the requirement against the state's asserted interest.[369] Courts apply strict scrutiny to rules that impose "severe" restrictions on minor parties,[370] but "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[371] States may permissibly require that minor parties demonstrate a "significant" quantum of support in the electorate to ensure manageable ballots, protect electoral integrity[372] and political stability,[373] and avoid voter confusion.[374] Although these interests are balanced, the essential determination remains whether the challenged ballot access laws effectively freeze the status quo by barring all candidates outside of the major parties from the ballot.[375]

As one lower court noted, "[c]hallenges by third parties and independent candidates of various state regulatory schemes are no

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364 *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968) (Harlan, J., concurring) (noting that Ohio increased its ballot access requirements after Harry Wallace won 30,000 votes in 1948, while Harry Truman won the state by 7,000 votes).

365 *See* Richard Winger, How Ballot Access Laws Affect the U.S. Party System 24 app. A (August 30, 1995) (unpublished manuscript presented to the American Political Science Association, on file with the *Cornell Law Review*).

366 Ten states significantly increased access requirements from 1929-1960, and twenty-five states "drastically" increased requirements between 1961-1983. Among the most notable increases: Ohio increased its requirements from 30,953 signatures to 345,570; Louisiana increased from 1,000 signatures to 91,052 members; and California increased from 23,610 signatures to 236,608 signatures. *See id.* at 5-8.

367 *See, e.g*, Roberts, Note, *supra* note 78, at 128 ("Nearly every state requires a petition, convention, history of previous voter support or some combination of the three . . . before . . . [a] third party candidate can see his or her name on the ballot.").

368 *See* Bullock v. Carter, 405 U.S. 134, 142-43 (1972).

369 Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

370 *See, e.g.*, Norman v. Reed, 502 U.S. 279, 288-89 (1992).

371 *Anderson*, 460 U.S. at 788.

372 *See* TRIBE, *supra* note 14, § 13-20, at 1110-11.

373 *See* Storer v. Brown, 415 U.S. 724, 736 (1974).

374 *See* Lubin v. Panish, 415 U.S. 709, 715 (1974).

375 *See* Jenness v. Fortson, 403 U.S. 431, 438-39 (1971).

longer novel."[376] By the mid-1970s, litigation over state ballot access requirements concentrated on three primary barriers:[377] (1) "significant modicum of support" petition requirements,[378] (2) filing fees,[379] and (3) geographic distribution requirements.[380] The challenges expanded during the 1980s to include retention requirements,[381] administrative requirements and petition regulations,[382] and laws that restrict the pool of voters from which minor parties can gather signatures.[383]

The ballot access case law is, in its most important aspects, "settled." Prior to *Anderson*, lower courts eliminated the most onerous state ballot access laws, forcing states to allow "reasonable" access to the ballot.[384] Applying *Anderson*, however, courts have consistently up-

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376 Socialist Workers Party v. Hechler, 890 F.2d 1303, 1304 (4th Cir. 1989).

377 *See Developments*, *supra* note 80, at 1139-51 (synthesis of the major developments in electoral law in the mid-1970s).

378 *See, e.g.*, Storer v. Brown, 415 U.S. 724, 740 (1974) (remanding to district court to determine whether requiring 325,000 signatures in twenty-four days constituted an unconstitutional burden); American Party v. White, 415 U.S. 767, 783 (1974) (holding requirement of 22,000 signatures is constitutionally acceptable).

379 *See, e.g.*, Lubin v. Panish, 415 U.S. 709, 718 (1974) (a state cannot require indigent candidates to pay a filing fee when there are no reasonable alternative means to ballot access).

380 *See, e.g.*, Moore v. Ogilvie, 394 U.S. 814, 818-19 (1969).

381 Retention statutes require a minor party to win a certain percentage of the vote to maintain its ballot status. *See, e.g.*, McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1222 (4th Cir. 1995) (challenging retention statute requiring two percent of vote in previous election and ten percent in the subsequent election to gain and maintain a position on the ballot).

382 The statutes require certain information to appear on the petition, such as the voters' ward, and they require specific procedures, like notarization of the petition signatures. *See, e.g.*, Schulz v. Williams, 44 F.3d 48, 50, 57 (2d Cir. 1994) (upholding statute requiring the election district, assembly district, and ward to appear on the petition).

383 *See, e.g.*, Socialist Workers Party v. Hechler, 890 F.2d 1303, 1308, 1310 (4th Cir. 1989) (invalidating a requirement that a signatory of a nominating petition must also declare a desire to vote for the candidate in a general election).

384 *See, e.g.*, Lubin v. Panish, 415 U.S. 709 (1974) (state filing fees); Williams v. Rhodes, 393 U.S. 23, (1968) (signatures of fifteen percent of the electorate); Blomquist v. Thomson, 739 F.2d 525 (10th Cir. 1984) (party recognition statute requiring a congressional candidate to poll at least ten percent of the vote); McLain v. Meyer, 637 F.2d 1159 (8th Cir. 1980) (15,000 signatures 150 days before the general election); American Party v. Jernigan, 424 F. Supp. 943 (E.D. Ark. 1977) (deadlines for filing petitions to establish political parties were unconstitutionally vague and seven percent petition requirement was excessive); Lendall v. Bryant, 387 F. Supp. 397 (E.D. Ark. 1975) (15% petition requirement is unconstitutional as applied to independent candidates); Baird v. Davoren, 346 F. Supp. 515 (D. Mass. 1972) (geographic distribution requirements); American Indep. Party v. Cenarrusa, 442 P.2d 766 (Idaho 1968) (statute limiting ballot access to nominee of political parties; to constitute a political party, the organization must have placed three candidates on the general election ballot and have one candidate receive 10% of the vote). Eugene McCarthy and John Anderson challenged, with surprising success, the laws of fifteen states. *See, e.g.*, Anderson v. Mills, 664 F.2d 600 (6th Cir. 1981); Anderson v. Hooper, 632 F.2d 116 (10th Cir. 1980); McCarthy v. Tribbitt, 421 F. Supp. 1193 (D. Del. 1976); McCarthy v. Askew, 420 F. Supp. 775 (S.D. Fla. 1976). The success of these candidates in the lower courts prompted some observers to call those decisions a "bloodless revolution." *See* Roberts,

held onerous ballot access requirements,[385] and the body of precedent that courts have generated in these cases indicates that future ballot access challenges are unlikely to significantly improve the legal position of minor parties. As a result, the courts will not remove the legal obstacles state legislatures place before minor parties.[386]

In a sense, the methodology used to analyze ballot access laws foretold the eventual end of successful challenges to state ballot access laws. A typical ballot access scheme requires that a minor party gather the requisite number of signatures from voters or party enrollees and submit these signatures, in strict accordance with certain procedural criteria, by a deadline well before the election.[387] Because courts generally analyze ballot access statutes by making state-by-state comparisons, if a few states enact similar statutes, courts are reluctant to overturn these legislative determinations.[388] The initial upper-bound that is established in this comparative analysis quickly becomes entrenched. As the Eleventh Circuit explained:

> Obviously any percentage or numerical requirement is "necessarily arbitrary." Once a percentage or number of signatures is established, it would probably be impossible to defend it as either compelled or least drastic. . . . Any numerical requirement could be challenged and judicially reduced, and then again, and again until it did not exist at all.[389]

Note, *supra* note 78, at 132 n.30. In fact, the *Williams* decision was originally interpreted by some commentators as establishing a right of candidacy, which would have seriously restricted the ability of states to enact ballot access laws. *See Developments*, *supra* note 80, at 1135 (reviewing commentary).

385 *See infra* text accompanying notes 392-433.

386 Commentators have described the case law as favorable to the two major parties, *see* Porto, *supra* note 4, at 308, and "leaving intact the greatest barriers to ballot access," Smith, Note, *supra* note 38, at 193.

387 *See generally* TRIBE, supra note 14, § 13-20, at 1101-09 (providing an overview of the doctrine).

388 *See, e.g.*, Manifold v. Blunt, 863 F.2d 1368, 1373 (8th Cir. 1988) (reasoning that the timing of presidential elector certifications is necessarily arbitrary and any particular date is "difficult to defend" as the least restrictive); Libertarian Party v. Davis, 766 F.2d 865 (4th Cir. 1985) (discussing same problem with geographic signature distribution requirements).

389 Libertarian Party v. Florida, 710 F.2d 790, 793 (11th Cir. 1983) (internal citation omitted). Justice Blackmun has voiced an analogous concern about the application of strict scrutiny to ballot access laws: "[F]or me, 'less drastic means' is a slippery slope . . . . A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring); *see also* McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1222 (4th Cir. 1995) ("[I]t is beyond judicial competence to identify, as an objective and abstract matter, the precise numbers and percentages that would constitute the least restrictive means to advance the states's avowed and compelling interests."), *cert. denied*, 1165 S. Ct. 1320 (1996); McLain v. Meier, 851 F.2d 1045, 1050 (8th Cir. 1988) ("A litigant could always point to a [filing] day slightly later that would not

The same logic applies to any numerically-based requirement; after an upper boundary is set, courts are reluctant to challenge its validity in a particular context or situation.[390] Now, if other states use similar laws, courts will overturn ballot access laws only when minor parties can show that the statute is arbitrary or is not related to a legitimate state interest.[391]

B. The Supreme Court Ballot Access Jurisprudence: Establishing the Undue Burden Standard

The fact remains that the Supreme Court has allowed very difficult ballot access requirements to withstand court scrutiny. In *Storer v. Brown*,[392] the Court held that it could not determine, without a factual determination of the size of the available signer pool, whether a California scheme that required voters to collect 325,000 signatures in twenty-four days constituted an impermissible burden on minor parties.[393] Furthermore, although the Court in *Williams v. Rhodes* struck down a provision requiring minor parties to collect the signatures of fifteen percent of the number of voters who voted in the preceding gubernatorial election,[394] the Court upheld a five percent registered voter requirement in *Jenness v. Fortson*.[395] These precedents enable states to defend quite onerous ballot access requirements.[396] Moreover, when balancing the burden imposed by ballot access statutes, the Court has demonstrated a marked deference to the state's asserted interests in ensuring fair and honest elections, eliminating voter confusion, maintaining political stability, and discouraging frivolous candidates.[397] By denoting a variety of these state interests as "compelling," laws that implicate these interests can, and do, survive

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significantly alter a state's interest until the point at which primary elections could not be held at all.").

390 *See* Libertarian Party v. Florida, 710 F.2d 790, 794 (11th Cir. 1983) (upholding regulation of time allowed for petitioning efforts).

391 *See, e.g.*, Patriot Party v. Mitchell, 826 F. Supp. 926, 941 (E.D. Pa. 1993).

392 415 U.S. 724 (1974). Lower federal courts cite this result as indicating that the court approved of the signature requirement in question. *See, e.g.*, Schulz v. Williams, 44 F.3d 48, 56 (2d Cir. 1994).

393 *Storer*, 415 U.S. at 738.

394 393 U.S. 23 (1968).

395 403 U.S. 431, 441 (1971). To distingnish the statute, the Court relied on a number of facts in addition to the lower signature requirement, i.e., the availability of write-in voting, the lack of a required primary for minor parties, more reasonable filing deadlines and a wide pool of voters who could sign petitions. *See id.* at 438-40.

396 *See, e.g*, Libertarian Party v. Florida, 710 F.2d 790, 795 (11th Cir. 1983) (relying on *Storer* to uphold state law requiring minor parties to gather an estimated 220,000 signatures).

397 *See* Porto, *supra* note 4, at 311 (criticizing the Court for overestimating the importance of the asserted state interests).

strict scrutiny.[398] In addition, the state is not required to demonstrate empirically the need for such restrictions.[399]

Finally, the Supreme Court's opinions reflect a view of political behavior by the electorate that severely underestimates the burden state electoral laws actually impose on minor parties. The inquiry asks whether a reasonably diligent candidate could satisfy the state requirements.[400] Rather than grounding this hypothetical candidate in the reality of third party organization, however, the Court states that a third party candidate should be able to attract 1,000 volunteers, who would gather fourteen signatures per day for twenty-four days, in order to fulfill a state signature requirement of 325,000 signatures.[401]

By comparison, the Court's decisions protecting minor parties are of limited practical significance. Minor parties' claims are successful only when the "challenged ballot-access restrictions . . . virtually preclude[ ] electoral activity by those candidates."[402] The Court has held that early filing deadlines for independent candidates are unconstitutional,[403] and that a state may not require more signatures for an office in a smaller political district than in a larger one.[404] In short, the Supreme Court has created a ballot-access doctrine that is antagonistic to the interests of third parties, and the application of this doctrine by the lower courts is generally consistent with these precedents.

The second factor limiting the future potential of ballot access litigation is the courts' use of the "totality approach" to analyze ballot access schemes. This approach considers the burden imposed by a given statute in light of the state's overall election scheme.[405] In other words, courts often do not consider just a particular statute, but consider the burden imposed by all the states' electoral laws operating

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398 *See* Lightfoot v. Eu, 964 F.2d 865, 869 (9th Cir. 1992) ("[U]nlike other areas in which strict scrutiny has been employed, its invocation in election law cases has not preordained their outcome.").

399 *See* Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986); Hagelin for President Comm. v. Graves, 25 F.3d 956, 960 (10th Cir. 1994); Libertarian Party v. Roberts, 750 P.2d 1147, 1154 (Or. 1988).

400 *See* Storer v. Brown, 415 U.S. 724, 742 (1974).

401 *See id.* at 740.

402 Porto, *supra* note 4, at 308.

403 *See* Anderson v. Colebrezze, 460 U.S. 780 (1983). This holding has lessened the problem of early filing provision for minor party candidates only marginally however. *See infra* Part II.C.2.

404 *See* Norman v. Reed, 502 U.S. 279 (1992).

405 *See, e.g.*, McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1223 (4th Cir. 1995) (upholding combination signature requirements and vote requirements to maintain place on ballot), *cert. denied*, 116 S. Ct. 1320 (1996); Schulz v. Williams, 44 F.3d 48, 55 (2d Cir. 1994) (upholding New York requirement that independent nominating petition contain each signer's election district, assembly district and ward); Larouche v. Kezer, 990 F.2d 36, 40-41 (2d Cir. 1993) (upholding Connecticut media recognition statute); McLain v. Meier, 851 F.2d 1045, 1049 (8th Cir. 1988) (upholding North Dakota signature requirements and early filing deadline).

together. This doctrinal approach discourages future ballot access challenges by minor parties because, if a court approves a state's *entire* ballot access system, a subsequent court is unlikely to second-guess this determination if minor parties later challenge an *individual* statute in the same state. After *Williams*, for example, the Supreme Court approved state electoral laws "in toto" in Georgia[406] and Texas.[407] After *Anderson*, the lower courts approved the entire body of election laws in North Carolina,[408] Florida,[409] Oklahoma,[410] Maine,[411] Washington,[412] West Virginia,[413] North Dakota,[414] Virginia,[415] Missouri,[416] and Connecticut.[417] Rather than proceed in a purely piecemeal fashion courts can uphold the entire electoral scheme at once. Of course, a court is not precluded from finding a single ballot access law unconstitutionally burdensome in a particular state after the state's overall scheme has survived court scrutiny.[418] However, by analyzing the entirety of the state's electoral laws, the courts make challenging those laws individually more difficult and less likely to succeed.[419] The totality approach increases the weight of litigated cases and discourages

406 *See* Jenness v. Fortson, 403 U.S. 431 (1971).

407 *See* American Party v. White, 415 U.S. 767 (1974).

408 *See McLaughlin*, 65 F.3d 1215 (4th Cir. 1995).

409 *See* Libertarian Party v. Florida, 710 F.2d 790 (11th Cir. 1983).

410 *See* Rainbow Coalition v. Oklahoma State Election Bd, 844 F.2d 740 (10th Cir. 1988).

411 *See* Libertarian Party v. Diamond, 992 F.2d 365 (1st Cir. 1993).

412 *See* Libertarian Party v. Munro, 31 F.3d 759 (9th Cir. 1994).

413 *See* Socialist Workers Party v. Hechler, 890 F.2d 1303 (4th Cir. 1989).

414 *See* McLain v. Meier, 851 F.2d 1045 (8th Cir. 1988); McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980).

415 *See* Libertarian Party v. Davis, 766 F.2d 865 (4th Cir. 1985).

416 *See* Libertarian Party v. Bond, 764 F.2d 538 (8th Cir. 1985).

417 *See* Larouche v. Kezer, 990 F.2d 36 (2d Cir. 1993).

418 *See, e.g.*, Pilcher v. Rains, 853 F.2d 334 (5th Cir. 1988) (holding Texas provision requiring the placement of voter registration numbers on the ballot access provision unconstitutional after the state's electoral laws had undergone a "totality" analysis).

419 To demonstrate this analytical process, consider the current controversy over laws that require a *statewide* showing of "significant support" before granting ballot access for minor party candidates seeking *local* offices. Statutes that premise a political party's ballot access for all local offices entirely on the statewide support received by that party's gubernatorial or presidential candidate impose serious burdens on minor parties seeking to begin a "grassroots" organizational strategy. *See McLaughlin*, 65 F.3d at 1223-24. For example, North Carolina will not allow a minor party to place a candidate on the ballot for a *local* political office without gathering signatures of two percent of the *statewide* electorate. *See id.* at 1223. As a result, even if a minor party candidate won a local office as an independent candidate "her ability to designate her party affiliation for purposes of reelection would be conditioned on the party's ability to register support elsewhere." *Id.* at 1223. The Supreme Court had never expressly ruled on the problem of predicating local access on statewide support. *See id.* at 1225. Because in *American Party v. White*, 415 U.S. 767, 781 (1974), the Supreme Court approved the electoral laws in Texas "taken as a whole," however, and Texas required a statewide showing of support to gain access to the local ballot, the Fourth Circuit determined that the Court had implicitly approved the particular Texas statute. *See McLaughlin*, 65 F.3d at 1125 n.10-11.

litigation over state electoral laws that have already received broad, if not detailed and individually considered, scrutiny.

C. Statute-Specific Challenges to Ballot Access Laws

Despite courts' use of the totality approach, minor party challenges to specific statutes remain standard fare. Most states, however, have successfully defended the most important legal barriers to third party success, and they are quite sophisticated at creating statutes that increase the cost of minor party activity, without overstepping constitutional bounds.[420] This Part summarizes the major legal obstacles to minor party access to the political system.

1. *Signature Requirements: Establishing a Modicum of Support in the Electorate*

The signature petition imposes the greatest costs on third parties seeking ballot placement.[421] Currently, no state employs a signature requirement that is greater than five percent of registered voters.[422] Therefore, challenges based purely on the number of signatures are probably not viable in light of *Jenness v. Forston.*[423] To attack the minimum support requirements, minor parties challenged a combination of signature requirements and other ballot access requirements that increase the burden imposed on the party. The most important recent minor party challenges involved the combination of high signature requirements and "retention requirements." These combinations of statutes require a party to collect signatures to gain a place on the ballot and then invalidate a party's ballot-qualified status

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420 For example, in 1995, Maine amended its signature requirements to require a new party to enroll five percent of the states registered voters in the party—rather than just require them to sign a petition—before the party can participate in the primary. ME. REV. STATE. ANN. tit. 21-A, § 303 (West 1995). In Kansas, a candidate's petition circulator must live in the same precinct as the petition signer. KAN. STAT. ANN. § 25-303 (1986).

421 The cost for Ross Perot's Reform Party to become ballot qualified in 50 states will run into the "tens of millions of dollars." Sam Howe Verhovek, *Perot as a Political Presence,* N.Y. TIMES, Jan. 23, 1996, at A10. If the party wishes to become a true national party and run candidates for all federal offices, according to one calculation, the party members will need to gather 3,501,629 valid signatures nationwide. *See* Winger, *supra* note 365, at 8. In order to appear on the ballot in all fifty states and the District of Columbia, in 1992 a new party presidential candidate needed to gather 640,000 petition signatures, and 79,300 new party registrants. *See* Katz & Kolodny, *supra* note 2, at 30.

422 *See* EDWARD D. FEIGENBAUM & JAMES A. PALMER, FEDERAL ELECTION COMMISSION, BALLOT ACCESS 1: ISSUES AND OPTIONS 69 (1988) (noting that the range is from 25 signatures for congressional offices to five percent of registered voters).

423 403 U.S. 431 (1971) (finding that five percent of vote cast in preceding election is constitutional). *See also* Hall v. Simcox, 766 F.2d 1171 (7th Cir. 1985) (two percent of vote); Libertarian Party v. Florida, 710 F.2d 790 (11th Cir. 1983) (three percent of vote); Populist Party v. Herschler, 746 F.2d 656 (10th Cir. 1984) (five percent); Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982) (five percent); Beller v Adams, 235 So. 2d 502, 508 (Fla. 1970) (slightly more than five percent).

for the next election if the party's candidate does not receive a certain percentage of the vote, usually ten to twenty percent.[424] Because the major parties always poll higher than these percentages, these statutes ensure that they have automatic access to the general election ballot. Minor parties object to these statutes because, once a party has demonstrated a modicum of support, the failure of a party to poll a much higher percentage on election day does not mean the party lacks the necessary electoral support required for ballot access in the next election.[425] The state electoral laws thus combine "to ensure that the [minor party] . . . expend[s] great effort to obtain statewide and local ballot access . . . only to lose that access *in toto* immediately thereafter."[426] Despite the fact that under *Anderson* some courts found that these schemes imposed severe burdens,[427] courts uniformly rejected minor party challenges to them.[428]

Similarly, courts have been quite willing to approve of other methods states use to increase the cost of petition drives. States can require that signatures be geographically distributed throughout the state,[429] and that each individual candidate circulate his or her own petition.[430] States can require that any voter who signs a petition for a minor party candidate must forfeit his or her right to vote in a party primary,[431] which severely reduces the pool of voters who are generally willing to sign petitions.[432] States can also adopt onerous administrative and procedural requirements that govern the petition process.[433] Moreover, other candidates can challenge the signature

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424 *See* McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1221 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

425 *See, e.g., McLaughlin*, 65 F.3d at 1222-23; Patriot Party v. Mitchell, 826 F. Supp. 926, 934 (E.D. Pa. 1993).

426 *McLaughlin*, 65 F.3d at 1224.

427 *See, e.g., id.* at 1221 ("[T]he burden that North Carolina's ballot access restrictions impose on protected interests is undoubtedly severe—that is, as history reveals, those regulations make it extremely difficult for any 'third party' to participate in electoral politics.").

428 *See id.* at 1222-23 (two percent signature and ten percent vote requirements); Rainbow Coalition v. Oklahoma State Election Bd, 844 F.2d 740, 741-42 (10th Cir. 1988) (five percent signature and ten percent vote requirements); Libertarian Party v. Davis, 766 F.2d 865, 867 (4th Cir. 1985) (.5% signature and ten percent vote requirements); Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375, 1378-79 (10th Cir. 1982) (same); *Patriot Party*, 826 F. Supp. at 935 (two percent signature and fifteen percent vote requirements).

429 *See* Libertarian Party v. Bond, 764 F.2d 538, 543 (8th Cir. 1985); Udall v. Bowen, 419 F. Supp. 746 (S.D. Ind.), *aff'd*, 425 U.S. 947 (1976).

430 *See* National Prohibition Party v. Colorado, 752 P.2d 80, 84 (Colo. 1988).

431 *See* Socialist Workers Party v. Hechler, 890 F.2d 1303 (4th Cir. 1989) (upholding state law disqualifying from participation in primary elections voters who signed nominating petitions for minor party candidates).

432 *See id.* at 1305.

433 In *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994), the Second Circuit upheld New York's much maligned requirement that the election district, assembly district, and ward must be indicated for every voter who signs an independent nominating petition. *Id.* at 55-56. Because the statute allowed other candidates to challenge the signatures, the require-

petitions of minor party candidates for failure to adhere to the letter of the requirements.[434]

These cases, as a whole, indicate that the most important mechanisms states use to increase the cost of gaining ballot access survive court scrutiny. The cost of signature drives is the central mechanism to thwarting minor-party ballot access. Yet, the legal barriers blocking minor-party ballot access will remain largely as they are. Thus, it is fair to conclude that since *Anderson*, the minor parties have not significantly benefitted from the Supreme Court's doctrine regulating political parties in this crucial area.

2. *Filing Deadlines*

Courts also allow states to require that minor party candidates submit nominating petitions much earlier in the election year than independent candidates or the major parties. States routinely require minor parties and independent candidates to submit their signature petitions and often a declaration of their candidates' candidacy by a specified date.[435] The constitutionality of filing deadlines, however, is less settled than the signature requirements case law. After *Anderson*, both minor parties and independent candidates enjoyed some success challenging state deadlines that required the submission of petition signatures before June 1 of an election year.[436] However, some courts interpreting *Anderson* have developed different standards based on whether the candidate is a minor party or independent candidate.[437] These courts claim that political party and independent candidate activity are different because the goal of a minor party is to gain control of the state government; thus, states have a greater interest in their

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ment actually doubled the amount of signatures needed to withstand scrutiny—from 15,000 to 30,000. *See id.* at 57. If the number of signatures required is large, the effect is magnified. *See* Libertarian Party v. Florida, 710 F.2d 790, 794 (11th Cir. 1983) (noting that the minor party needed to collect 220,000 signatures to ensure that they had 144,492 valid ones). Another administrative technique requires that "the witness be from the same congressional district as the petition signer." *See Libertarian Party*, 766 F.2d at 869.

434 *See, e.g., Schultz*, 44 F.3d at 57 (discussing challenges based on failure of petition to identify election district, assembly district, and ward for each signer).

435 *See generally* FEIGENBAUM & PALMER, *supra* note 422, 18-19 (addressing implications of early filing deadlines, particularly when combined with numerical signature requirements).

436 *See, e.g.*, Blomquist v. Thomson, 739 F.2d 525, 528 (10th Cir. 1984) ("The June 1 deadline prevents a new party from seeking support at a time when such support is most likely to crystallize—after the established political parties have put forth their candidates and platforms."); Libertarian Party v. Oklahoma State Election Bd., 593 F. Supp. 118, 122 (W.D. Okla. 1984) (petitioning period from March 1st to May 29th); Stoddard v. Quinn, 593 F. Supp. 300 (D. Me. 1984) (April 1st deadline).

437 *See, e.g.*, Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 746 n.9 (10th Cir. 1988); Cromer v. South Carolina, 917 F.2d 819, 823 (4th Cir. 1990) ("[A]s between new (third) party candidacies and independent candidacies, independent candidacies must be accorded even more protection than third party candidacies.").

regulation.[438] In addition, some courts limit *Anderson*'s holding to presidential elections because states have less interest in regulating national elections, which have ramifications that extend beyond the state's borders, than in state or local elections.[439] Because minor parties run candidates for state and local office, this characterization of the case provides further support for early filing deadlines.

The result: minor parties are required to submit nomination papers far in advance of independent candidates. States employ filing deadlines for minor parties that are more than six months earlier than those imposed for independent candidates,[440] and courts have approved deadlines requiring filing more than 200 days before the general election.[441] These deadlines create an incentive for independent candidates—candidates who probably would be predisposed to consider a minor party affiliation—to not affiliate in order to have extra time to satisfy petition requirements.

3. *Minor Party Successes: When States Have No Legitimate Interest*

When courts have invalidated state ballot access laws, these legal victories have been of limited significance to minor parties. For example, some minor parties successfully challenged state laws controlling the content of forms used to gather signatures during petition drives

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438 *See, e.g.*, Storer v. Brown, 415 U.S. 724, 745 (1974).

439 *See* Anderson v. Celebrezze, 460 U.S. 780, 794-95 (1983) (discussing the variation of state interests in state and national elections); *Rainbow Coalition*, 844 F.2d at 746 n. 9. (relying on the distinction to justify early filing deadline for minor party); Dart v. Brown, 717 F.2d 1491, 1503 (5th Cir. 1983) ("The [*Anderson*] Court was divided five to four, and the majority placed heavy emphasis on the strong national, and diminished state, interest in presidential elections."); Stevenson v. State Board of Elections, 638 F. Supp. 547, 552 (N.D. Ill.), *aff'd*, 794 F.2d 1176 (7th Cir. 1986). *But see* Goldman-Frankie v. Austin, 727 F.2d 603, 607 (6th Cir. 1984) (refusing to restrict the Court's holding in *Anderson* to only national elections); Cripps v. Seneca County Bd. of Elections, 629 F. Supp. 1335, 1348 (N.D. Ohio 1985) (same).

440 For example, California requires minor parties to file in October of the year prior to the election, but allows independent candidates to file as late as August 9 of the election year. North Dakota requires that minor parties file in December of the year prior to the election, but allows independent candidates to file September 6 of the election year. Similarly, Maine requires minor parties to file in December of the prior year, but allows independent candidates to file in June of the election year. *1996 Petitioning for President*, BALLOT ACCESS NEWS (COFOE, San Francisco, Cal.) January 14, 1996, at 5.

441 *See, e.g.*, McLain v. Meier, 851 F.2d 1045, 1049-51 (8th Cir. 1988); *see also* American Party v. White, 415 U.S. 767, 787 n.18 (1974) (filing deadline 120 days before election is constitutional); Libertarian Party v. Bond, 764 F.2d 538, 542 (8th Cir. 1985) (filing deadline 91 days before general election and one week before primary is constitutional); U.S. Taxpayers Party v. Smith, 871 F. Supp. 426, 434 (N.D. Fla. 1993) (upholding deadline 120 days before general election for minor party). Minor parties are succeeding in challenging some early filing requirements that take place before these dates. *See* Libertarian Party v. Ehrler, 776 F. Supp. 1200, 1205-06 (E.D. Ky. 1991) (invalidating deadline 119 days prior to the primary elections and 280 days prior to the general election). *But cf.* Stevenson v. State Bd. of Elections, 638 F. Supp. 547 (N.D. Ill.), *aff'd*, 794 F.2d 1176 (7th Cir. 1986) (approving a deadline 323 days before general election for independent candidates).

on the grounds that the forms were designed to dissuade voters from signing.[442] Courts have rejected state laws requiring petition signers to state their intention to vote for a minor party candidate.[443] However, the Fourth Circuit has approved a statute requiring nominating petitions to indicate that the signer intends to become an active party organizer.[444] Therefore, these minor successes still leave the state considerable discretion to formulate antagonistic langnage on petitions.

Minor-party challenges are more effective when there is clear evidence of unequal treatment in comparison to independent or other similarly situated candidates, and the state cannot articulate an acceptable reason to justify it.[445] Thus, for example, in *Fulani v. Krivanek*,[446] the Eleventh Circuit invalidated a Florida statute that allowed the state to waive a ten cent signature verification fee for independent candidates seeking access to the ballot, but explicitly prohibited minor parties from receiving a waiver.[447] The state failed to produce a state interest to justify imposing the disparate burden on minor parties as opposed to independents.[448] Under *Krivanek*, a state may not impermissibly distinguish between similarly situated candidates or organizations without a valid justification.[449]

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442 *See* McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1227 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 1320 (1996).

443 *See* Socialist Workers Party v. Hechler, 890 F.2d 1303, 1309 (4th Cir. 1989).

444 *See id.* The Fourth Circuit's holding in *McLaughlin* on this point seems to be in considerable tension with a number of decisions in which district courts rejected the contention that a petition signer must enroll in the party or state their allegiance to the party's principles. *See* Workers World Party v. Vigil-Giron, 693 F. Supp. 989 (D.N.M. 1988) (invalidating statute requiring party membership in order to sign ballot access petition); Libertarian Party v. Swackhamer, 638 F. Supp. 565, 568 (D. Nev. 1986) (invalidating statement of allegiance to party principles requirement); Libertarian Party v. Kundert, 579 F. Supp. 735, 739 (D.S.D. 1984) (similar); Libertarian Party v. Beermann, 598 F. Supp. 57 (D. Neb. 1984) (similar); North Carolina Socialist Workers Party v. North Carolina State Bd. of Elections, 538 F. Supp. 864 (E.D.N.C. 1982) (invaliding law that automatically enrolled all petition signers in the new party and informed voters of this change on the petition).

445 In contrast, minor parties are not injured "merely by the fact that they are treated differently from major parties." Libertarian Party v. Munro, 31 F.3d 759, 765 (9th Cir. 1994). *See also* American Party v. White, 415 U.S. 767, 782 n.13 (1974) (holding that states are not required to treat major and minor parties the same).

446 973 F.2d 1539 (11th Cir. 1992).

447 *See id.*

448 *See id.* at 1546-48.

449 *But see* Unity Party v. Wallace, 707 F.2d 59, 60 (2d Cir. 1983) (holding that statute that only required person nominated by "independent bodies" to file acknowledgment of candidacies, but did not require the same of political parties, did not violate equal protection). States can impose more onerous requirements on minor-party candidates than on independent candidates if the state's justification is adequate and is related to the distinction. *See, e.g.*, Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740, 746 n.9 (10th Cir. 1988). The required state interests are not particularly weighty; they include ensuring that the party label has meaning, *see id.* at 746 n.9, and that party candidates have

Finally, a minor party may be successful if a state regulation has no legitimate purpose. For example, a state has no legitimate interest in requiring more signatures for local elections than for statewide elections,[450] or for relatively less significant offices than for higher offices. Thus, in *Patriot Party v. Mitchell*,[451] the court invalidated a Pennsylvania statute that required judicial candidates to gather more signatures than presidential or gubernatorial candidates.[452] Again, the significance of these cases is minor. These statutes are often the result of "historical accident"[453] and do little to reduce the cost of gaining ballot access.

4. *Summary*

Since *Anderson*, minor parties have been almost uniformly unsuccessful in challenging important state ballot access restrictions. Their few victories have had little political importance. Although minor parties enjoyed a few meaningful successes early on, those favorable decisions did not significantly reduce the cost of attaining ballot access. Indeed, gaining access to a ballot continues to cost millions of dollars. Moreover, the cost of organizing a party remains high and is unlikely to change short of direct legislative action by the Congress or the state legislatures—an event not likely to come to pass.[454] The current system of ballot access remains highly biased against minor party organization, while the major parties enjoy ever more freedom from state control.

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adequate intraparty support, *see Krivanek*, 973 F.2d at 1546 (citing Macbride v. Askew, 541 F.2d 465 (5th Cir. 1976)).

450 *See* Norman v. Reed, 502 U.S. 279, 282 (1992); Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).

451 Patriot Party v. Mitchell, 826 F. Supp. 926 (E.D. Pa. 1993).

452 *See id.*; *cf.* Gjersten v. Board of Election Comm'rs, 791 F.2d 472 (7th Cir. 1986) (invalidating statute requiring ward committeeman candidates to gather more signatures that townsbip committeeman candidates wben the two offices were the same).

453 *See Socialist Workers Party*, 440 U.S. at 187.

454 The last attempt to regnlate state ballot access for federal elections did not fare well. House Bill 1582, 99th Cong. (1985), submitted to the Sub-Committee on Elections of the House Administration Committee, established consistent standards for state regnlation of federal ballot-access requirements, but left the states the discretion to regulate within federally prescribed guidelines. *See* Francine Miller, Note, *Fairness in the Election Arena: Congressional Regulation of Federal Ballot Access*, 32 N.Y.L. SCH. L. REV. 903, 913 (1987).

III

THE POLITICAL AND DOCTRINAL CONSEQUENCES OF THE STATE REGULATION OF POLITICAL PARTIES

A. Doctrinal Tension Between the Associational Rights and Ballot Access Cases

As courts have strengthened the associational rights of political parties and the ballot access case law has become more entrenched and settled, tensions have begun to emerge between the two doctrines. Courts tend to treat the ballot access and associational rights case law as discrete and independent categories of cases.[455] The associational rights cases protect political parties' First Amendment rights, whereas the ballot access cases place some limits on what states can require as conditions of entry to the political process. Yet on a deeper level, both lines of cases are involved in same enterprise—limiting the burden of state laws on political parties. The distinction the courts appear to draw seems somewhat artificial. Ballot access law is simply one way that state law impinges on parties' freedom to pursue their political goals.

Because these laws are intertwined, as courts expand the associational rights of political parties but defer to state regulations when minor parties challenge ballot access laws, the courts create inconsistencies within doctrines. A comparison of the rationales used to justify "bifurcated electoral systems"—electoral systems that create separate ballot access systems for major and minor parties[456]—reveals this tension. In the seminal ballot-access case, *Jenness v. Fortson*,[457] the Court held that a minor party's associational rights were not infringed by a statute that ensured automatic access to the ballot for the major parties, but required minor parties to gather the signatures of at least five percent of the state's registered voters.[458] The Court reasoned that this disparate treatment was justified because the states required the major parties to maintain burdensome party structures.[459] A similar rationale was employed in *American Party v. White*,[460] in which the Court upheld a state statute requiring minor parties to nominate by statewide convention.[461] According to the Court, the convention process was not invidiously more burdensome than a state-mandated primary because state law required the major parties to hold "precinct,

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455 *See, e.g.*, Republican Party v. Faulkner County, 49 F.3d 1289, 1292-94 (8th Cir. 1995).

456 *See, e.g.*, American Party v. White, 415 U.S. 767 (1974).

457 403 U.S. 431 (1971).

458 *See id.* at 441.

459 *See id.*

460 415 U.S. 767 (1974).

461 *See id.*

county, and state conventions to adopt and promulgate party platforms and to conduct other business."[462]

With the expansion of major political parties' associational rights in *Eu v. San Francisco County Democratic Central Committee*,[463] the *Jenness* Court's claim that states can mandate that the major parties maintain onerous organizational structures has become increasingly tenuous. State provisions that dictate the specific organizational structures of party governing bodies and party nomination procedures directly implicate associational rights; thus, the state must put forth compelling reasons to justify them.[464] It is precisely the state's regulation of the internal affairs of the political party that the Supreme Court's decision in *Eu*[465] and the Eleventh Circuit's rejection of state-mandated party-funded primaries in *Faulkner*[466] render of dubious constitutionality. However, when courts analyze whether a state ballot access law is unduly burdensome under *Anderson*, they consider whether the major party is required to hold state conventions.[467] Similarly, in *American Party* the Supreme Court noted that requiring complex nominating conventions throughout the state "is unrelated to ballot qualification and corresponds more to the democratic management of the political party's internal affairs."[468] Thus, state-mandated organizational structures and internal nomination procedures in state-mandated conventions, a central factor that justified the disparate treatment of major and minor parties in the Supreme Court's ballot access jurisprudence, might be unconstitutional. If this is the case, then the differential treatment that minor parties receive cannot be justified on this basis.

The substantial support requirements in the ballot access case law also conflict with the associational rights cases granting political parties the power to decide which voters may participate in their primaries. In *Munro v. Socialist Workers Party*,[469] the Court upheld a "blanket primary," in which registered voters may vote for any candidate of their choice, irrespective of the candidates' or voters' party affiliation.[470] A Democrat, for example, could vote for Pat Buchanan or David Duke as the Republican nominee. If the nominated minor party candidate won their election and received at least one percent of the overall vote for an office, that candidate qualified for the gen-

462 *Id.* at 781.

463 489 U.S. 214 (1989). For a discussion of this case, see *supra* notes 138-41.

464 489 U.S. at 229.

465 *See supra* text accompanying notes 183-88.

466 *See supra* Part I.D.2.

467 Socialist Workers Party v. Hechler, 890 F.2d 1303, 1306 (4th Cir. 1989) ("[M]inor parties under [the ballot access laws] are spared the necessity of having . . . precinct, county, and state conventions, a not inconsiderable burden in itself.").

468 *American Party*, 415 U.S. at 784 n.15.

469 479 U.S. 189 (1986).

470 *See id.* at 192.

eral election ballot on the party's banner.[471] This procedure represented the sole path to the ballot. The Socialist Workers Party claimed that the law was unduly burdensome under the traditional ballot access case law, but the Court upheld the primary scheme because the state was free to require an initial showing of electoral support.[472] Under the associational rights case law, however, the argument against state mandated open primaries is much stronger. A state-mandated "blanket" primary allows nonaffiliated voters to determine the minor parties' nominees for the general election. In *Democratic Party v. Wisconsin* ex rel. *La Follette*,[473] the Court upheld the Democratic Party's rejection of the results of a primary election mandating an open primary and in *Tashjian v. Republican Party*[474] the Court rejected Connecticut's prohibition on independents voting in the Republican primary. Under these precedents, it is questionable whether a state can mandate that a minor party accept the results of a primary that forces the minor party to associate with non-party members, absent clear indication by the Court that minor parties do not have the same associational rights as major parties. *Munro* was decided in 1986, before the Court's decisions in *Tashjian* and *Eu*. As a result, the effects of the primary on minor parties' associational rights were not discussed. Although the states have the discretion to require a modicum of support, it is not clear that this discretion extends to the utilization of a primary scheme that interferes with ability of the party to select its standard bearer.

B. Structural Obstacles to the Creation of Third Parties

As this Note demonstrates, the law treats major and minor parties very differently. Political scientists and legal commentators recognize that the barriers to entry created by the major parties in state legislatures contribute to the monopoly enjoyed by the Democrats and Republicans.[475] It is therefore useful to ask whether this disparate treatment is necessary. The persistence of the two major parties in American politics, and the two-party system itself, has provided the focus for much academic debate.[476] This Note will not repeat these arguments. However, it should be noted that law appears to be but-

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471 *See id.*

472 *See id.* at 199.

473 *See* Democratic Party v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981).

474 479 U.S. 208 (1986).

475 *See e.g.*, Lawson, *supra* note 7, at 243-47; Katz & Kolodny, *supra* note 2, at 46 ("[O]ne might well wonder why the [Democrats and Republicans] persist at all . . . . The two parties enjoy . . . important advantages, and benefit from a variety of institutional barrier to the entry of any new parties. Officials elected on the slates of the two parties are, of course, the ones who gave themselves these advantages.").

476 *See* Keefe, supra note 59, at 61-66; Smith, Note, *supra* note 38, at 203-06.

tressing the political hegemony of the major parties at the expense of political expression and competition. States claim that ballot access laws are needed because a proliferation of minor parties will cause political instability and factionalism.[477] Even without formal legal barriers, the American political system is highly antagonistic to political actors outside the two-party system. Although political scientists have observed that ballot access restrictions discourage the formation and continuation of third parties, the greatest barriers to the creation of third parties are endemic to the fundamental structure of the political system itself. In particular, two factors discourage the creation and maintenance of minor political parties. The most obvious and, to many commentators, the most important, is expressed in Duverger's Law: "The simple-majority single ballot system favors the two-party system."[478] In an electoral system in which a plurality victor—the candidate who obtains the most votes—receives the entire political reward, small political parties are penalized because if they do not win that plurality, they receive nothing.[479] This structure creates an incentive for practical parties to combine efforts in an attempt to win that "magical" plurality.[480] Moreover, as Douglas W. Rae observed in his seminal work on the political impact of electoral law:

> [T]he perceived effects of electoral systems may be just as important as their actual consequences. Electoral systems thought to do violence to small parties will eliminate them *before* the election because their leaders decide against the contest. The idea that an electoral

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477 *See, e.g.*, Storer v. Brown, 415 U.S. 724, 736 (1974) (noting that states can protect against the potential damage to the democratic system that splintered parties could cause); New Alliance Party v. Hand, 933 F.2d 1568, 1572 n.12 (11th Cir. 1991) (conceding claim that Alabama had an interest in ensuring "the winners are a choice of a majority of at least a strong plurality of those voting . . . and to avoid the possibility of unrestrained factionalism at the general election").

478 MAURICE DUVERGER, POLITICAL PARTIES 217 (Barbara North & Robert North trans., John Wiley & Sons, Inc. 1954) (1951).

479 Generally, leading political parties receive "disproportionately large shares of parliamentary seats, other less successful parties must in turn receive disproportionately small parcels of seats." DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS 77 (1967); *see also* KEEFE, *supra* note 59, at 5-6 (describing the incentives created by single-member plurality districts).

480 The Electoral College strengthens this incentive structure. *See* REICHLEY, *supra* note 6, at 36. By awarding presidential delegates only if a candidate receives the plurality of the vote in an entire state, outsider candidates have a difficult time winning any electoral votes. Ross Perot, for example, received 18.9% of the popular vote in 1992, but received no electoral votes. However, when the candidate's support is concentrated in a geographic area, the minor party candidate can win electoral votes. Thus, George Wallace won 13% of the vote in 1968 and received a roughly proportionate percentage of the electoral vote. *See* KEEFE, *supra* note 60, at 65. The effect of the Electoral College is so strong that in James Reichley's view, "[i]f it is ever pulled, the two-party system will probably go with it." REICHLEY, supra note 6, at 37.

> system refuses representation to small parties becomes a self-fulfilling hypothesis . . . .[481]

To make matters worse, like firms that seek to maximize profits by restricting market entry by new firms, the vote-maximizing major political parties rationally seek to restrict the ability of minor parties to enter the political market.[482] One tool they can use is the ballot access law.

Minor parties also are unlikely to succeed because the act of organizing a political party on a large scale, even in the absence of legal barriers, is simply a difficult task. For example, organizing is a very expensive project, but the campaign finance system is quite antagonistic to small parties. The federal government provides generous funding to the Republican and Democratic Parties. In 1992 the government distributed about $153 million in federal funds to presidential candidates, of which $22 million funded the major parties' national conventions.[483] Minor parties can receive public money only in very limited circumstances.[484] The disparity in funding assists the organizing efforts of the major parties, and guarantees that minor parties will remain hopelessly underfunded (with the notable exception of Ross Perot's Reform Party).[485] On this point, America compares poorly with the other modern democracies.[486]

The states' claims that political chaos and factionalism justify ballot access restrictions are dubious in light of the powerful incentives already built into the structure of the political system to control the proliferation of minor parties.[487] These structural impediments suggest that the two-party system would persist even without ballot access

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481 RAE, *supra* note 479, at 79.

482 *See* RICHARD A. CHAMPAGNE, WHY ARE THERE NO THIRD PARTIES IN THE U.S.: DUVERGER'S LAW OR POLITICAL REGULATIONS? 9-10 (Dep't of Gov't, Univ. of Essex Paper in Politics and Gov't No. 45, 1987).

483 *See* KEEFE, *supra* note 59, at 172.

484 Minor-party and independent candidates need to receive five percent of the vote in the previous election to receive campaign financing. New parties qualify for public money only after the election, provided they receive five percent of the vote in that election. Because the money is not disbursed until after the election, the minor party remains underfunded during the election, making it more difficult to attain the required five percent of the vote. *See id.* at 169.

485 Commentators have attributed the resurgence of the political party in the election process to the increase in funding. *See id.* at 320-21; Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities,* 56 FORDHAM L. REV. 53, 88 (1987).

486 All Austrian parties that receive more than one percent of the vote receive state subsidies at both the national and the local level. *See* Wolfgang C. Müller, *The Development of Austrian Party Organizations in the Post-war Period, in* HOW PARTIES ORGANIZE, *supra* note 2, at 54-55. Similarly, Danish parties receive state subsidies based on the number of votes they receive. *See* Lars Bille, *Denmark: The Decline of the Membership Party?, in* HOW PARTIES ORGANIZE, *supra* note 2, at 145-46.

487 *See* Smith, Note, *supra* note 38, at 209.

requirements. The question remains whether the Democrats and Republicans have a state-created, judicially enforced right to dominant power within it. Third parties in the American political system rarely win elections,[488] but they add other values to political life by providing a vehicle for discontented voters[489] and important policy innovations,[490] and encouraging the major parties to stay responsive to voters.[491] More importantly, however, third parties have the potential to dramatically reshape the political landscape and change the structure of American politics forever. The Republican Party, after all, is the most successful third party of all time.[492] As a result, perhaps the restrictions on minor parties impose costs on society by stifling important political activity without conferring a corresponding benefit.[493]

C. The Law and the Creation of Stronger Parties

What are the stakes in the protection of parties against state intervention? Consider the major recent trends in party politics. The major political parties are becoming ideologically homogeneous within their ranks.[494] There is little left of the moderate wings of the Republican and Democratic parties; conservative Democrats and liberal Republicans are endangered political species.[495] Because the major parties nominate candidates with the direct primary, however, the parties remain quite open to participation by outsider elements.[496] Although this arrangement is democratic, political scientists routinely identify the open primary as one of the primary causes of the weak-

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488 *See* William B. Hasseltine, *Introduction* to HOWARD P. NASH, JR., THIRD PARTIES IN AMERICAN POLITICS at v (1959).

489 *See* Bernard C. Barmann, *Third-Party Candidates and Presidential Debates: A Proposal to Increase Voter Participation in National Elections*, 23 COLUM. J.L. & SOC. PROBS. 441, 444 (1990) (discussing how third parties encourage "candidates to discuss ideas and programs they might otherwise avoid and offer a constructive means of expressing discontent").

490 *See* Smith, Note, *supra* note 38, at 169 (noting that third parties first advocated the "direct election of senators, women's suffrage, nomination through party primaries, the eight-hour work day, child labor laws, federal farm aid, and the graduated income tax").

491 *See* John Hicks, *The Third Party Tradition in American Politics*, 20 MISS. VALLEY HIST. REV. 3, 26-27 (1933), *quoted in* Barmann, *supra* note 489, at 444-45.

492 *See* REICHLEY, *supra* note 6, at 113-34.

493 Notably, states that use very low ballot access requirements do not experience difficulties. New Jersey, for example, requires only 800 signatures for a statewide party, and yet experiences no difficulty with ballot clutter or an unstable political system. *See* Winger, *supra* note 365, at 16.

494 *See* Sundquist, *supra* note 27, at 214-16; KEEFE, *supra* note 59, at 312-13.

495 *See* Sundquist, *supra* note 27, at 214-15 (calling the progressive Republicans "an ineffectual remnant" and explaining that "conservative Democrats have ended their careers one by one").

496 *See* Katz & Kolodny, *supra* note 2, at 31 (describing electoral competition as between two candidates, "one called the 'Democrat' and the other called the 'Republican' but neither chosen by a party with any organizational control over their selection.").

ness of American parties because it allows any candidate with support to harness the power of the party's name in the electorate.[497] It has produced an unpredictable and volatile nomination process.[498] As James Sundquist notes, "[i]t has to appear anomalous that anyone, no matter how ideologically opposed to the program and philosophy of the Democratic or Republican Party, may run for Congress as the Party's candidate . . . ."[499] Earlier this Note argued that major political parties are no longer sacrificial lambs required to submit to this situation.[500] Although the wide use of direct primaries probably guarantees their continuation in a substantially unaltered form given that top-down decisionmaking is politically untenable,[501] associational rights put the major parties in a strong legal position to introduce mechanisms to screen candidates and to actively influence party nominations.

Legal developments which alter the legal status of political parties warrant close attention.[502] The legal environment profoundly influences their development.[503] They are highly adaptable organizations that are affected by the external constraints imposed by outside forces.[504] As William J. Keefe has noted, "parties are less what they make of themselves than what their environment makes of them."[505] The legal system has changed; the parties are likely to change in response.[506] If parties are to increase their strength as electoral organi-

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497 *See* Lawson, *supra* note 7, at 247-50.

498 *See* Ceaser, *supra* note 5, at 108.

499 Sundquist, *supra* note 27, at 217.

500 *See supra* Part I.D and text accompanying notes 239-41.

501 Twenty-six states use a closed primary system, in which only party members can vote. Twenty-one states use open primaries, in which all voters may participated in the primary. *See* KEEFE, *supra* note 59, at 89-91.

502 Strong parties have the power to shape political competition in the electorate. E.E. Schattschneider, the great scholar of parties, explained that the parties are not "merely appendages of modern government; they are in the center of it and play a determinative and creative role in it." E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 1 (1942).

503 For example, the state laws in the Northeast are more likely to support strong parties, while the electoral laws in the southern states tend to weaken parties. KEEFE, *supra* note 59, at 3.

504 *See* Ceaser, *supra* note 5, at 136-37 (arguing that law is one of the most important factors influencing the development of political parties).

505 KEEFE, *supra* note 59, at 1.

506 Professor Lowenstein claims that "the underlying issues at stake in the litigation over parties' constitutional rights . . . are unlikely to have any but the most marginal consequences for . ... basic party structure." Lowenstein, *supra* note 43, at 1744. Political Scientist James Ceaser disagrees:

> If no one at this point can say how far the principle of legal autonomy for parties will go, it is certain to have profound implications. Changes in legal status generally work their effects well beyond the immediate cases at hand. Moreover, the efforts to win a new legal status for political parties, whether pursued in courts or in legislatures, affect parties at their base in the states and localities. It is here in the long run that the battle for stronger parties will ultimately be decided.

zations, they will need to take advantage of the new legal flexibility created by the Supreme Court's associational rights doctrine.

Although the ideological purity of the major parties has increased, the levels of partisanship in the American electorate have decreased.[507] In 1946, only twenty percent of the population identified themselves as "Independents."[508] By 1992, there were more Independents than Republicans and these voters were "attracted to third-party or independent presidential candidates."[509] Even more striking, in 1944, a Roper Poll found that only fourteen percent of the public supported the creation of a new party to challenge the Democrats and Republicans.[510] In October 1992, sixty-three percent of those surveyed favored the creation of a third political party.[511] Will our legal-electoral system meet the demands of these voters?

If voters want choices not represented by the two major parties, it is questionable whether all the political activity should be channeled by the electoral system through the major parties. As political scientists recognize, the legal barriers to third-party activity provide a strong incentive for independent candidates to attempt to participate within the major parties.[512] If the major parties continue to develop into stronger, more ideologically pure parties, the parties might resist or deter the inclusion of candidates with views that conflict with the party mainstream. And a strong argument could be made that this is perfectly acceptable in a system of party governance. Yet, as the desire for more political choice increases, the systemic bias created by onerous ballot access laws seems increasingly undemocratic. Therefore, perhaps the double standard the legal system has created needs to be reassessed. If the Supreme Court continues to expand the associational rights of political parties, it should realize these changes increase the influence of the major political parties as political actors and reinforce the disparity between major and minor parties in the political marketplace.

Ceaser, *supra* note 5, at 128-29.

507 *See* KEEFE, *supra* note 59, at 290.

508 *See id.* at 205 fig.5-4 (presenting data collected in *Gallup Report*). *See generally* GORDON S. BLACK & BENJAMIN D. BLACK, THE POLITICS OF AMERICAN DISCONTENT 150-56 (1994) (providing overview of the rise of independent voters); MARTIN P. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES 1952-1992 (1994) (documenting the long-term decline in partisanship among the electorate).

509 KEEFE, *supra* note 59, at 290.

510 *See* BLACK & BLACK, *supra* note 508, at 23.

511 *See id.* at 25 (reporting national poll of likely voters by Yankelovich, Clancy, and Schulman).

512 *See* KEEFE, *supra* note 59, at 62.

CONCLUSION

The essence of democracy is choice. There are two avenues for candidates to provide voters with that choice: political competition inside or outside the major parties. The expanding associational rights of major parties and the continued viability of onerous state ballot access laws will probably not increase political choice in American politics. Perhaps the answer, as some legal commentators have advocated, is a return to strict scrutiny of state ballot access laws.[513] This solution would place greater limitations on states' ability to enact legal barriers to third party activity. States would be forced to demonstrate a compelling interest to justify such regulations. However, this Note demonstrates that whether there are doctrinal solutions to the disparate legal status of major and minor parties, given the current legal climate, this solution is little more than wishful thinking. If the answer to increasing ballot access lies anywhere, it appears to be in the hands of state legislatures.

Benjamin D. Black†

513 *See* Porto, *supra* note 4, at 315-17; Smith, Note, *supra* note 38, at 212-14.

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